No. 17-5716

IN THE

Supreme Court of the United States

TIMOTHY KOONS, ET AL.,

Petitioners,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

JOINT APPENDIX

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Petition for Writ of Certiorari Filed: August 22, 2017
Certiorari Granted: December 8, 2017

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IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

United States of America v. Timothy Koons
Case No. 15-3794

RELEVANT DOCKET ENTRIES

Date Filed	Docket Text
12/08/2015	CRIMINAL case docketed. [4344142] [15-3794] (CAH) [Entered: 12/08/2015 12:22 PM]
01/12/2016	MOTION to consolidate cases 15-3794, 15-3825, 15-3854, 15-3894., filed by Attorney Mr. Joseph Herrold for Appellant Mr. Timothy D. Koons w/service 01/12/2016. [4355030] [15-3794] (JH) [Entered: 01/12/2016 09:14 AM]
01/12/2016	CLERK ORDER: [4355030-2] The motion to Consolidate Cases 15-3794 (USA v Koons), 15-3825 (USA v Putensen), 15-3854 (USA v Feauto), and 15-3894 (USA v Gardea) is granted. Appellant's brief(s) due February 10, 2016. ASSOCIATION CREATED., case association created - 15-3825, 15-3854, 15-3894 (Consolidated started 01/12/2016) with 15-3794 [4355396] [15-3794, 15-3825, 15-3854, 15-3894] (SRD) [Entered: 01/12/2016 02:39 PM]

04/29/2016	JUDGE ORDER: On the court's own motion, these cases are removed from the May 19, 2016 oral argument calendar in Omaha, Nebraska. The clerk is directed to place the cases on the court's October, 2016 oral argument calendar in St. Paul, Minnesota. Counsel will be advised of the time and date of the oral argument when the court establishes the October, 2016 oral argument calendar. Hrg May 2016 [4393945] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (TAB) [Entered: 04/29/2016 03:06 PM]
10/19/2016	ARGUED & SUBMITTED in St. Paul to Judges Roger L. Wollman, James B. Loken, Duane Benton on 10/19/2016 Mr. Joseph Herrold for Appellants Mr. Timothy D. Koons (15-3794), Mr. Kenneth Jay Putensen (15-3825), Mr. Randy Feauto (15-3854), Mr. Esequiel Gutierrez (15-3880) and Mr. Jose Gardea (15-3894). Mr. Patrick J. Reinert for Appellee United States of America in 15-3794, 15-3825, 15-3854, 15-3880, 15-3894. No Rebuttal. RECORDED. Click Here To Listen to Oral Argument [4460831] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (LAD) [Entered: 10/19/2016 03:20 PM]
03/10/2017	OPINION FILED - THE COURT: Roger L. Wollman, James B. Loken

	and Duane Benton AUTHORING JUDGE: James B. Loken (PUBLISHED) [4510830] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (SRD) [Entered: 03/10/2017 09:58 AM]
03/10/2017	JUDGMENT FILED - The judgment of the Originating Court is AFFIRMED in accordance with the opinion.. ROGER L. WOLLMAN, JAMES B. LOKEN and DUANE BENTON Hrg Oct 2016 [4510853] [15-3794] (SRD) [Entered: 03/10/2017 10:28 AM]
03/24/2017	PETITION for enbanc rehearing and also for rehearing by panel filed by Appellant Mr. Timothy D. Koons in 15-3794, Appellant Mr. Kenneth Jay Putensen in 15-3825, Appellant Mr. Randy Feauto in 15-3854, Appellant Mr. Esequiel Gutierrez in 15-3880, Appellant Mr. Jose Manuel Gardea in 15-3894 w/service 03/24/2017 [4516043] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (JH) [Entered: 03/24/2017 01:45 PM]
05/25/2017	JUDGE ORDER: Denying [4516043-2] petition for enbanc rehearing filed by Appellant Mr. Timothy D. Koons, Appellant Mr. Kenneth Jay Putensen, Appellant Mr. Randy Feauto,

Appellant Mr. Esequiel Gutierrez, Appellant Mr. Jose Manuel Gardea. The petition for panel rehearing is also denied. Judge Kelly did not participate in the consideration or decision of this matter.; [4516043-3PUBLISHED ORDER. Hrg Oct 2016 [4540216] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (SRD) [Entered: 05/25/2017 08:49 AM]

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

United States of America v. Randy Feauto
Case No. 15-3854

RELEVANT DOCKET ENTRIES

Date Filed	Docket Text
12/14/2015	CRIMINAL case docketed. [4346382] [15-3854] (PSA) [Entered: 12/14/2015 03:36 PM]
01/12/2016	CLERK ORDER: [4355030-2] The motion to Consolidate Cases 15-3794 (USA v Koons), 15-3825 (USA v Putensen), 15-3854 (USA v Feauto), and 15-3894 (USA v Gardea) is granted. Appellant's brief(s) due February 10, 2016. ASSOCIATION CREATED., case association created - 15-3825, 15-3854, 15-3894 (Consolidated started 01/12/2016) with 15-3794 [4355396] [15-3794, 15-3825, 15-3854, 15-3894] (SRD) [Entered: 01/12/2016 02:39 PM]
04/29/2016	JUDGE ORDER: On the court's own motion, these cases are removed from the May 19, 2016 oral argument calendar in Omaha, Nebraska. The clerk is directed to place the cases on the court's October, 2016 oral argument calendar in St. Paul,

Minnesota. Counsel will be advised of the time and date of the oral argument when the court establishes the October, 2016 oral argument calendar. Hrg May 2016 [4393945] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (TAB) [Entered: 04/29/2016 03:06 PM]

10/19/2016 ARGUED & SUBMITTED in St. Paul to Judges Roger L. Wollman, James B. Loken, Duane Benton on 10/19/2016 Mr. Joseph Herrold for Appellants Mr. Timothy D. Koons (15-3794), Mr. Kenneth Jay Putensen (15-3825), Mr. Randy Feauto (15-3854), Mr. Esequiel Gutierrez (15-3880) and Mr. Jose Gardea (15-3894). Mr. Patrick J. Reinert for Appellee United States of America in 15-3794, 15-3825, 15-3854, 15-3880, 15-3894. No Rebuttal. RECORDED. Click Here To Listen to Oral Argument [4460831] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (LAD) [Entered: 10/19/2016 03:20 PM]

03/10/2017 OPINION FILED - THE COURT: Roger L. Wollman, James B. Loken and Duane Benton
AUTHORING JUDGE: James B. Loken (PUBLISHED) [4510830] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (SRD) [Entered: 03/10/2017 09:58 AM]

03/10/2017	JUDGMENT FILED - The judgment of the Originating Court is AFFIRMED in accordance with the opinion. ROGER L. WOLLMAN, JAMES B. LOKEN and DUANE BENTON Hrg Oct 2016 [4510860] [15-3854] (SRD) [Entered: 03/10/2017 10:36 AM]
03/24/2017	PETITION for en banc rehearing and also for rehearing by panel filed by Appellant Mr. Timothy D. Koons in 15-3794, Appellant Mr. Kenneth Jay Putensen in 15-3825, Appellant Mr. Randy Feauto in 15-3854, Appellant Mr. Esequiel Gutierrez in 15-3880, Appellant Mr. Jose Manuel Gardea in 15-3894 w/service 03/24/2017 [4516043] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (JH) [Entered: 03/24/2017 01:45 PM]
05/25/2017	JUDGE ORDER: Denying [4516043-2] petition for enbanc rehearing filed by Appellant Mr. Timothy D. Koons, Appellant Mr. Kenneth Jay Putensen, Appellant Mr. Randy Feauto, Appellant Mr. Esequiel Gutierrez, Appellant Mr. Jose Manuel Gardea. The petition for panel rehearing is also denied. Judge Kelly did not participate in the consideration or decision of this matter.; [4516043-3 PUBLISHED ORDER. Hrg Oct 2016 [4540216] [15-

3794, 15-3825, 15-3854, 15-3880, 15-3894] (SRD) [Entered: 05/25/2017 08:49 AM]

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

United States of America v. Kenneth Jay Putensen
Case No. 15-3825

RELEVANT DOCKET ENTRIES

Date Filed	Docket Text
12/10/2015	Originating court document filed consisting of notice of appeal filed 12/7/15, Consent Plea filed 4/4/08, R & R filed 4/4/08, Judgment filed 10/2/08, Orders filed 4/1/15, 6/10-/15, 11/24/15, Memorandum Opinion filed 11/24/15, docket entries, & SEALED documents: Docs-27 & 29 Probation Reports filed 10/9/14 & 4/1/15, Doc 30-Govt. Report filed 4/10/15, Doc 34- Def. Memorandum filed 10/15/15 [4345172] [15-3825] (JMH) [Entered: 12/10/2015 11:24 AM]
01/12/2016	CLERK ORDER: [4355030-2] The motion to Consolidate Cases 15-3794 (USA v Koons), 15-3825 (USA v Putensen), 15-3854 (USA v Feauto), and 15-3894 (USA v Gardea) is granted. Appellant's brief(s) due February 10, 2016. ASSOCIATION CREATED., case association created - 15-3825, 15-3854, 15-3894 (Consolidated started 01/12/2016) with 15-3794 [4355396]

[15-3794, 15-3825, 15-3854, 15-3894] (SRD) [Entered: 01/12/2016 02:39 PM]

04/29/2016 JUDGE ORDER: On the court's own motion, these cases are removed from the May 19, 2016 oral argument calendar in Omaha, Nebraska. The clerk is directed to place the cases on the court's October, 2016 oral argument calendar in St. Paul, Minnesota. Counsel will be advised of the time and date of the oral argument when the court establishes the October, 2016 oral argument calendar. Hrg May 2016 [4393945] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (TAB) [Entered: 04/29/2016 03:06 PM]

10/19/2016 ARGUED & SUBMITTED in St. Paul to Judges Roger L. Wollman, James B. Loken, Duane Benton on 10/19/2016 Mr. Joseph Herrold for Appellants Mr. Timothy D. Koons (15-3794), Mr. Kenneth Jay Putensen (15-3825), Mr. Randy Feauto (15-3854), Mr. Esequiel Gutierrez (15-3880) and Mr. Jose Gardea (15-3894). Mr. Patrick J. Reinert for Appellee United States of America in 15-3794, 15-3825, 15-3854, 15-3880, 15-3894. No Rebuttal. RECORDED. Click Here To Listen to Oral Argument [4460831] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (LAD) [Entered: 10/19/2016 03:20 PM]

03/10/2017	OPINION FILED - THE COURT: Roger L. Wollman, James B. Loken and Duane Benton AUTHORING JUDGE: James B. Loken (PUBLISHED) [4510830] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (SRD) [Entered: 03/10/2017 09:58 AM]
03/10/2017	JUDGMENT FILED - The judgment of the Originating Court is AFFIRMED in accordance with the opinion.. ROGER L. WOLLMAN, JAMES B. LOKEN and DUANE BENTON Hrg Oct 2016 [4510857] [15-3825] (SRD) [Entered: 03/10/2017 10:33 AM]
03/24/2017	PETITION for en banc rehearing and also for rehearing by panel filed by Appellant Mr. Timothy D. Koons in 15-3794, Appellant Mr. Kenneth Jay Putensen in 15-3825, Appellant Mr. Randy Feauto in 15-3854, Appellant Mr. Esequiel Gutierrez in 15-3880, Appellant Mr. Jose Manuel Gardea in 15-3894 w/service 03/24/2017 [4516043] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (JH) [Entered: 03/24/2017 01:45 PM]
05/25/2017	JUDGE ORDER: Denying [4516043-2] petition for enbanc rehearing filed by Appellant Mr. Timothy D. Koons,

Appellant Mr. Kenneth Jay Putensen, Appellant Mr. Randy Feauto, Appellant Mr. Esequiel Gutierrez, Appellant Mr. Jose Manuel Gardea. The petition for panel rehearing is also denied. Judge Kelly did not participate in the consideration or decision of this matter.; [4516043-3 PUBLISHED ORDER. Hrg Oct 2016 [4540216] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (SRD) [Entered: 05/25/2017 08:49 AM]

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

United States of America v. Jose Gardea
Case No. 15-3894

RELEVANT DOCKET ENTRIES

Date Filed	Docket Text
12/17/2015	CRIMINAL case docketed. [4347800] [15-3894] (PSA) [Entered: 12/17/2015 12:52 PM]
01/12/2016	CLERK ORDER: [4355030-2] The motion to Consolidate Cases 15-3794 (USA v Koons), 15-3825 (USA v Putensen), 15-3854 (USA v Feauto), and 15-3894 (USA v Gardea) is granted. Appellant's brief(s) due February 10, 2016. ASSOCIATION CREATED., case association created - 15-3825, 15-3854, 15-3894 (Consolidated started 01/12/2016) with 15-3794 [4355396] [15-3794, 15-3825, 15-3854, 15-3894] (SRD) [Entered: 01/12/2016 02:39 PM]
04/29/2016	JUDGE ORDER: On the court's own motion, these cases are removed from the May 19, 2016 oral argument calendar in Omaha, Nebraska. The clerk is directed to place the cases on the court's October, 2016 oral argument calendar in St. Paul,

Minnesota. Counsel will be advised of the time and date of the oral argument when the court establishes the October, 2016 oral argument calendar. Hrg May 2016 [4393945] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (TAB) [Entered: 04/29/2016 03:06 PM]

10/19/2016 ARGUED & SUBMITTED in St. Paul to Judges Roger L. Wollman, James B. Loken, Duane Benton on 10/19/2016 Mr. Joseph Herrold for Appellants Mr. Timothy D. Koons (15-3794), Mr. Kenneth Jay Putensen (15-3825), Mr. Randy Feauto (15-3854), Mr. Esequiel Gutierrez (15-3880) and Mr. Jose Gardea (15-3894). Mr. Patrick J. Reinert for Appellee United States of America in 15-3794, 15-3825, 15-3854, 15-3880, 15-3894. No Rebuttal. RECORDED. Click Here To Listen to Oral Argument [4460831] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (LAD) [Entered: 10/19/2016 03:20 PM]

03/10/2017 OPINION FILED - THE COURT: Roger L. Wollman, James B. Loken and Duane Benton
AUTHORING JUDGE: James B. Loken (PUBLISHED) [4510830] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (SRD) [Entered: 03/10/2017 09:58 AM]

03/10/2017	JUDGMENT FILED - The judgment of the Originating Court is AFFIRMED in accordance with the opinion. ROGER L. WOLLMAN, JAMES B. LOKEN and DUANE BENTON Hrg Oct 2016 [4510864] [15-3894] (SRD) [Entered: 03/10/2017 10:42 AM]
03/24/2017	PETITION for en banc rehearing and also for rehearing by panel filed by Appellant Mr. Timothy D. Koons in 15-3794, Appellant Mr. Kenneth Jay Putensen in 15-3825, Appellant Mr. Randy Feauto in 15-3854, Appellant Mr. Esequiel Gutierrez in 15-3880, Appellant Mr. Jose Manuel Gardea in 15-3894 w/service 03/24/2017 [4516043] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (JH) [Entered: 03/24/2017 01:45 PM]
05/25/2017	JUDGE ORDER: Denying [4516043-2] petition for enbanc rehearing filed by Appellant Mr. Timothy D. Koons, Appellant Mr. Kenneth Jay Putensen, Appellant Mr. Randy Feauto, Appellant Mr. Esequiel Gutierrez, Appellant Mr. Jose Manuel Gardea. The petition for panel rehearing is also denied. Judge Kelly did not participate in the consideration or decision of this matter; [4516043-3 PUBLISHED ORDER. Hrg Oct 2016 [4540216] [15-

3794, 15-3825, 15-3854, 15-3880, 15-3894] (SRD) [Entered: 05/25/2017 08:49 AM]

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

United States of America v. Esequiel Gutierrez
Case No. 15-3880

RELEVANT DOCKET ENTRIES

Date Filed	Docket Text
12/16/2015	CRIMINAL case docketed. [4347269] [15-3880] (PSA) [Entered: 12/16/2015 01:45 PM]
04/29/2016	JUDGE ORDER: On the court's own motion, these cases are removed from the May 19, 2016 oral argument calendar in Omaha, Nebraska. The clerk is directed to place the cases on the court's October, 2016 oral argument calendar in St. Paul, Minnesota. Counsel will be advised of the time and date of the oral argument when the court establishes the October, 2016 oral argument calendar. Hrg May 2016 [4393945] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (TAB) [Entered: 04/29/2016 03:06 PM]
10/11/2016	LETTER from Appellant Mr. Esequiel Gutierrez to defer argument time. w/service 10/11/2016 [4457632] [15-3880] (PAW) [Entered: 10/11/2016 04:18 PM]

10/19/2016	ARGUED & SUBMITTED in St. Paul to Judges Roger L. Wollman, James B. Loken, Duane Benton on 10/19/2016 Mr. Joseph Herrold for Appellants Mr. Timothy D. Koons (15-3794), Mr. Kenneth Jay Putensen (15-3825), Mr. Randy Feauto (15-3854), Mr. Esequiel Gutierrez (15-3880) and Mr. Jose Gardea (15-3894). Mr. Patrick J. Reinert for Appellee United States of America in 15-3794, 15-3825, 15-3854, 15-3880, 15-3894. No Rebuttal. RECORDED. Click Here To Listen to Oral Argument [4460831] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (LAD) [Entered: 10/19/2016 03:20 PM]
03/10/2017	OPINION FILED - THE COURT: Roger L. Wollman, James B. Loken and Duane Benton AUTHORING JUDGE:James B. Loken (PUBLISHED) [4510830] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (SRD) [Entered: 03/10/2017 09:58 AM]
03/10/2017	JUDGMENT FILED - The judgment of the Originating Court is AFFIRMED in accordance with the opinion. ROGER L. WOLLMAN, JAMES B. LOKEN and DUANE BENTON Hrg Oct 2016 [4510862] [15-3880] (SRD) [Entered: 03/10/2017 10:39 AM]

03/24/2017	PETITION for en banc rehearing and also for rehearing by panel filed by Appellant Mr. Timothy D. Koons in 15-3794, Appellant Mr. Kenneth Jay Putensen in 15-3825, Appellant Mr. Randy Feauto in 15-3854, Appellant Mr. Esequiel Gutierrez in 15-3880, Appellant Mr. Jose Manuel Gardea in 15-3894 w/service 03/24/2017 [4516043] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (JH) [Entered: 03/24/2017 01:45 PM]
05/25/2017	JUDGE ORDER: Denying [4516043-2] petition for en banc rehearing filed by Appellant Mr. Timothy D. Koons, Appellant Mr. Kenneth Jay Putensen, Appellant Mr. Randy Feauto, Appellant Mr. Esequiel Gutierrez, Appellant Mr. Jose Manuel Gardea. The petition for panel rehearing is also denied. Judge Kelly did not participate in the consideration or decision of this matter.; [4516043-3 PUBLISHED ORDER. Hrg Oct 2016 [4540216] [15-3794, 15-3825, 15-3854, 15-3880, 15-3894] (SRD) [Entered: 05/25/2017 08:49 AM]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA

United States of America v. Timothy Koons
Case No. 5:10-cr-04031-MWB-2

RELEVANT DOCKET ENTRIES

Date Filed	#	Docket Text
05/20/2010	3	Indictment
05/28/2010	6	Information to Establish Prior Conviction
07/20/2010	24	Change of Plea Hearing
10/15/2010	55	Sentencing
10/19/2010	56	Judgment
10/20/2010	57	Sealed Statement of Reasons
03/06/2015	89	Order
04/10/2015	92	Order
06/16/2015	93	Notice (Other)
07/17/2015	96	Sentencing Memorandum
11/24/2015	100	Order
12/07/2015	103	Notice of Appeal – Final Judgment

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA

United States of America v. Randy Feauto
Case No. 3:12-cr-03046-MWB-1

RELEVANT DOCKET ENTRIES

Date Filed	#	Docket Text
09/20/2012	2	SEALED Indictment as to Defendant Randy Feauto (1) on Counts 1, 2, 3 and 4: Voting record in vault (Attachment # 1 Unredacted Version) (USA, eUSM, USP) (kfs) (Entered: 09/21/2012)
10/31/2012	14	INFORMATION to Establish Prior Conviction as to Defendant Randy Feauto (Wehde, Shawn) (Entered: 10/31/2012)
02/22/2013	41	NOTICE of Consent to Entry of a Plea of Guilty and Rule 32 Waiver by Defendant Randy Feauto (des) (Entered: 02/22/2013)
06/25/2013	55	MINUTE Entry for proceedings held before Judge Mark W Bennett: Sentencing held on 06/25/2013 as to Defendant Randy Feauto: Defendant's Exhibits A - D received and previously filed at Docket 53: Defendant detained (Court Reporter: Shelly Semmler) (kfs) (Entered: 06/25/2013)

06/27/2013	56	JUDGMENT as to Defendant Randy Feauto (1). Count(s) 1, 4: Committed to BOP 132 months consisting of 132 months on Count 1 and 132 months on Count 4 of the Indictment, to be served concurrently; Supervised Release 10 years consisting of 10 years on Count 1 and 3 years on Count 4 of the Indictment, to be served concurrently; $200 Assessment. Count(s) 2-3: Dismissed. Signed by Judge Mark W Bennett on 6/27/2013. (des) (Entered: 06/27/2013)
03/06/2015	59	ORDER Regarding Motion for Sentence Reduction - USSC Amendment as to Defendant Randy Feauto. This matter comes before the court on its own motion under 18 U.S.C. § 3582(c)(2). At the court's request, the United States Probation Office prepared a memorandum that, among other things, addresses the defendants eligibility for a sentence reduction under 18 U.S.C. § 3582(c)(2) and calculates the defendants amended guideline range. The government requests a hearing in this matter. The court declines to hold a hearing at this time. The government is directed to submit

		by no later than 03/26/15 a sealed report that details its position regarding a reduction in sentence pursuant to 18 U.S.C. § 3582(c)(2). At this point in the proceeding, the defendant need not submit to the court anything that responds to the governments sealed report. The clerk's office is directed to send a copy of this order to the defendant, the office of the Federal Public Defender, the office of the United States Attorney and the office of United States Probation. Signed by Judge Mark W Bennett on 3/6/15.(Copy w/NEF to Def; eFPD) (djs) (Additional attachment(s) added on 3/6/2015: # 1 Confirmation Receipt) (djs). (Entered: 03/06/2015)
04/10/2015	62	ORDER Setting Hearing as to Defendant Randy Feauto regarding a reduction in sentence pursuant to 18 U.S.C. § 3582(c)(2). The hearing is set for 7/17/2015 10:00 AM in SC 3rd Fl Ct before Judge Mark W Bennett. The clerk's office is directed to appoint counsel of record to represent the defendant and, if counsel of record is not available, the clerk's office is directed to appoint CJA counsel to represent the defendant. At the

hearing, appointed counsel shall represent the defendant, who shall participate by telephone. Each party shall file a list of all witnesses who are expected to be called to testify and a list of all exhibits that are expected to be offered by 7/12/2015. The clerk's office shall be directed to send a copy of this order to the defendant, the office of the Federal Public Defender, the office of the United States Attorney and the office of United States Probation. Signed by Judge Mark W Bennett on 4/9/2015. (copy w/NEF mailed to Def, eFPD, eCJA) (des) (Entered: 04/10/2015)

07/17/2015	69	MINUTE Entry for proceedings held before Judge Mark W Bennett: Evidentiary Hearing as to Defendant Randy Feauto held on 7/17/2015 as to Sentence Reduction - USSC Amendment. Court continued this matter for additional briefings by the parties. Court will set up a briefing schedule and send it to the parties. Defendant detained. (Court Reporter Shelly Semmler) (des) (Entered: 07/17/2015)

07/20/2015	70	ORDER re 59 Order Regarding Motion for Sentence Reduction as to Defendant Randy Feauto. As agreed to by the parties at the hearing, Plaintiff's Brief due by 8/28/2015. Defendant's Brief due by 9/17/2015. Plaintiffs Reply Brief due by 9/24/2015. The conclusion of the All Drugs Minus Two Hearing is set for 10/23/2015 10:00 AM in SC 3rd Fl Ct before Judge Mark W Bennett. **See text of Order for details.** Signed by Judge Mark W Bennett on 7/20/15. (copy w/nef mailed to defendant; eFPD) (djs) (Additional attachment(s) added on 7/20/2015: # 1 Confirmation Receipt) (djs). (Entered: 07/20/2015)
09/04/2015	73	BRIEF *as Requested by the Court* by USA as to Defendant Randy Feauto re 70 Order (Wehde, Shawn) Modified text on 9/8/2015 (des) (Entered: 09/04/2015)
09/17/2015	74	BRIEF as to Defendant Randy Feauto *(Amicus Curiae Brief)* (Herrold, Joseph) (Entered: 09/17/2015)
09/24/2015	79	MOTION for Leave to File Under Seal by Randy Feauto. (McGough, Jim) (Entered: 09/24/2015)

09/24/2015	80	TEXT ORDER ONLY granting 79 Motion for Leave to File as to Randy Feauto (1). The defendant has permission to file his Reply Brief under seal in this matter. Signed by Judge Mark W Bennett on 9/24/2015. (Gill, Jennifer) (Entered: 09/24/2015)
09/24/2015	82	MOTION for Leave to File Under Seal by Randy Feauto. (McGough, Jim) (Entered: 09/24/2015)
09/24/2015	83	TEXT ORDER ONLY granting 82 Motion for Leave to File as to Randy Feauto (1). The defendant filed Exhibit R under seal in this matter at docket 81 without permission of the court. He now requests permission to file that exhibit under seal. The court grants the motion and Exhibit R shall remain filed under seal at docket 81. (Entered: 09/23/2015) Signed by Judge Mark W Bennett on 9/24/2015. (Gill, Jennifer) (Entered: 09/24/2015)
10/23/2015	84	MINUTE Entry for proceedings held before Judge Mark W Bennett: Evidentiary Hearing as to Defendant Randy Feauto held on 10/23/2015 re All Drugs Minus Two Amendment 782. Sealed Defendant Exhibit R filed at 81.

		Sealed Defendant Exhibits E-Q and S to be filed by attorney Jim McGough by 10/28/2015. Defendant is detained. (Court Reporter Shelly Semmler) (des) (Entered: 10/23/2015)
11/03/2015	86	ORDER Setting Deadline for Response to Court's Tentative Memorandum Opinion and Order Regarding Resentencing as to Defendant Randy Feauto. The parties and amicus curie shall have to and including Wednesday, November 11, 2015, within which to file, under seal, their comments on the tentative ruling. Signed by Judge Mark W Bennett on 11/3/15. (djs) (Entered: 11/03/2015)
11/10/2015	87	SEALED *Comments of Iowa FPD in Response to Court's Proposed Order Addressing Application of Amendment 782* for USA, Daren Schumaker, Pat Korth, US Probation, Randy Feauto as to Defendant Randy Feauto. (Herrold, Joseph) Modified on 11/10/2015 to link to 70. (src) Modified on 11/12/2015 to link to 86. (des) (Entered: 11/10/2015)
11/11/2015	88	MOTION for Leave to File Under Seal by Randy Feauto. (McGough, Jim) (Entered: 11/11/2015)

11/12/2015	90	**TEXT ORDER ONLY** 88 Motion is granted as to Randy Feauto (1). Signed by Judge Mark W Bennett on 11/12/2015. (Mastalir, Roger) (Entered: 11/12/2015)
11/23/2015	92	ORDER Denying Sentence Reduction - USSC Amendment as to Defendant Randy Feauto. Signed by Judge Mark W Bennett on 11/23/15. (copy w/nef mailed to defendant) (djs) (Entered: 11/23/2015)
12/03/2015	93	NOTICE of Appeal by Defendant Randy Feauto re 92 Order (McGough, Jim) (Entered: 12/03/2015)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA

United States of America v. Kenneth Jay Putensen
Case No. 3:07-cr-03008-MWB-1

RELEVANT DOCKET ENTRIES

Date Filed	#	Docket Text
12/20/2007	1	INDICTMENT as to Kenneth Jay Putensen count 1. Voting record housed in vault. Copies to USM, USP, AUSA, Attny Stoler via CM-ECF. (src) (Additional attachment(s) added on 12/21/2007: # 1 Non Redacted Indictment) (src,). (Entered: 12/21/2007)
03/18/2008	10	INFORMATION TO ESTABLISH PRIOR CONVICTION as to Defendant Kenneth Jay Putensen (Fletcher, Kevin) (Entered: 03/18/2008)
04/04/2008	14	Sealed Minute Entry for proceedings held before Chief Magistrate Paul A Zoss. (Digital Recording.) (ak) (Additional attachment(s) added on 4/4/2008: # 1 Sealed Document) (ak). Modified on 4/15/2008 Copies to USA, USM, USP, Defense Attorney, (ak). (Entered: 04/04/2008)

10/02/2008	22	JUDGMENT as to Defendant Kenneth Jay Putensen, Count 1, Defendant committed to BOP for 264 months - Supervised Release for 10 years - Special Assessment fee of $100.00. Signed by Judge Mark W Bennett on 10/02/08. (src) (Entered: 10/02/2008)
04/01/2015	28	ORDER Regarding Motion for Sentence Reduction - USSC Amendment as to Defendant Kenneth Jay Putensen. This matter comes before the court on its own motion under 18 U.S.C. § 3582(c)(2). At the courts request, the United States Probation Office prepared a memorandum that, among other things, addresses the defendants eligibility for a sentence reduction under 18 U.S.C. § 3582(c)(2) and calculates the defendants amended guideline range. The government requests a hearing in this matter. The court declines to hold a hearing at this time. The government is directed to submit by no later than 04/10/15 a sealed report that details its position regarding a reduction in sentence pursuant to 18 U.S.C. § 3582(c)(2). At this point in the proceeding, the defendant need not submit to the court anything that

		responds to the governments sealed report. The clerk's office is directed to send a copy of this order to the defendant, the office of the Federal Public Defender, the office of the United States Attorney and the office of United States Probation. Signed by Judge Mark W Bennett on 4/1/15. (Copy w/NEF to Def; eFPD) (djs) (Entered: 04/01/2015)
06/10/2015	31	ORDER as to Defendant Kenneth Jay Putensen regarding a reduction in sentence pursuant to 18 U.S.C. § 3582(c)(2). The hearing is set for 08/20/2015 at 9:00 AM in SC 3rd Fl Ct before Judge Mark W Bennett. The clerk's office is directed to appoint counsel of record to represent the defendant and, if counsel of record is not available, the clerk's office is directed to appoint CJA counsel to represent the defendant. At the hearing, appointed counsel shall represent the defendant, who shall participate by telephone. Each party shall file a list of all witnesses who are expected to be called to testify and a list of all exhibits that are expected to be offered by 08/15/2015. The clerk's office shall be directed to send a

		copy of this order to the defendant, the office of the Federal Public Defender, the office of the United States Attorney and the office of United States Probation. Signed by Judge Mark W Bennett on 6/10/2015. (Copy w/NEF to Def) (des) (Entered: 06/11/2015)
06/16/2015	32	NOTICE *Regarding Resentencing* by USA as to Defendant Kenneth Jay Putensen re 31 Order (Wehde, Shawn) Modified text on 6/17/2015 (djs). (Entered: 06/16/2015)
10/16/2015	34	SEALED Sentencing Memorandum By Defendant *in support of sentence reduction under 18 U.S.C. § 3582(c) and retroactive amendments to the drug sentencing guidelines* as to Defendant Kenneth Jay Putensen (Herrold, Joseph) (Entered: 10/16/2015)
11/24/2015	38	ORDER Denying Sentence Reduction - USSC Amendment as to Defendant Kenneth Jay Putensen. The resentencing hearing currently scheduled for 12/21/2015 is cancelled. Signed by Judge Mark W Bennett on 11/23/2015. (Attachments: # 1 CR12-3046-MWB Memorandum

		Opinion and Order) (copy w/nef mailed to defendant) (des) (Entered: 11/24/2015)
12/07/2015	39	NOTICE of Appeal by Defendant Kenneth Jay Putensen re 38 Order (Herrold, Joseph) Modified text on 12/7/2015 (djs). (Entered: 12/07/2015)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA

United States of America v. Jose Manuel Gardea
Case No. 5:14-cr-04017-MWB-1

RELEVANT DOCKET ENTRIES

Date Filed	#	Docket Text
02/20/2014	2	INDICTMENT as to Jose Manuel Gardea (1) count(s) 1, 2. Voting record in vault. (Attachments: # 1 Unredacted) (des) (Entered: 02/20/2014)
04/21/2014	25	MINUTE Entry for proceedings held before Magistrate Judge Leonard T Strand: Change of Plea Hearing as to Defendant Jose Manuel Gardea held on 4/21/2014. Defendant pleaded guilty to count 1 of the Indictment. Count 2 will be dismissed at the time of sentencing. Defendant detained. Sealed Hearing Exhibit due by 4/24/2014. (FTR Gold) (des) (Entered: 04/21/2014)
07/17/2014	36	MINUTE Entry for proceedings held before Judge Mark W Bennett: Sentencing held on 7/17/2014 as to defendant Jose Manuel Gardea. Defendant is detained. (Court Reporter - Shelly

		Semmler) (src) (Entered: 07/17/2014)
07/17/2014	37	JUDGMENT as to Defendant Jose Manuel Gardea (1): Count 1: Defendant committed to BOP for 84 months: Defendant on supervised release for 96 months: $100 special assessment: Count 2: Dismissed. Signed by Judge Mark W Bennett on 07/17/14. (kfs) (Entered: 07/17/2014)
04/01/2015	39	ORDER Regarding Motion for Sentence Reduction - USSC Amendment as to defendant Jose Manuel Gardea. This matter comes before the court on its own motion under 18 U.S.C. § 3582(c)(2). At the courts request, the United States Probation Office prepared a memorandum that, among other things, addresses the defendants eligibility for a sentence reduction under 18 U.S.C. § 3582(c)(2) and calculates the defendants amended guideline range. The government requests a hearing in this matter. The court declines to hold a hearing at this time. The government is directed to submit by no later than 04/10/15 a sealed report that details its position regarding a

		reduction in sentence pursuant to 18 U.S.C. § 3582(c)(2). At this point in the proceeding, the defendant need not submit to the court anything that responds to the governments sealed report. The clerk's office is directed to send a copy of this order to the defendant, the office of the Federal Public Defender, the office of the United States Attorney and the office of United States Probation. Signed by Judge Mark W Bennett on 04/01/2015.(Copy w/NEF to Def at Oklahoma City Federal Transfer Center; eFPD) (src) (Entered: 04/01/2015)
06/10/2015	42	ORDER as to Defendant Jose Manuel Gardea regarding a reduction in sentence pursuant to 18 U.S.C. § 3582(c)(2). The hearing is set for 08/20/15 at 11:00 AM in SC 3rd Fl Ct before Judge Mark W Bennett. The clerk's office is directed to appoint counsel of record to represent the defendant and, if counsel of record is not available, the clerk's office is directed to appoint CJA counsel to represent the defendant. At the hearing, appointed counsel shall represent the defendant, who shall participate by telephone.

		Each party shall file a list of all witnesses who are expected to be called to testify and a list of all exhibits that are expected to be offered by 08/15/15. The clerk's office shall be directed to send a copy of this order to the defendant, the office of the Federal Public Defender, the office of the United States Attorney and the office of United States Probation. Signed by Judge Mark W Bennett on 6/10/15. (Copy w/NEF to Def; eFPD, eCJA) (djs) (Entered: 06/10/2015)
06/16/2015	43	NOTICE *Government's Memorandum Regarding Resentencing* by USA as to Defendant Jose Manuel Gardea re 42 Order. (Wehde, Shawn) Modified text on 6/17/2015 (skm). (Entered: 06/16/2015)
10/23/2015	45	SEALED Sentencing Memorandum By Defendant *in Support of Sentence Reduction Under 18 U.S.C. § 3582(c) and Retroactive Amendments to Drug Sentencing Guidelines* as to Defendant Jose Manuel Gardea (Herrold, Joseph) (Entered: 10/23/2015)

11/24/2015	48	ORDER Denying Sentence Reduction - USSC Amendment as to Defendant Jose Manuel Gardea. The resentencing hearing currently scheduled for 12/21/2015 is cancelled. Signed by Judge Mark W Bennett on 11/23/2015. (Attachments: # 1 CR12-3046-MWB Memorandum Opinion and Order) (copy w/nef mailed to defendant) (des) (Entered: 11/24/2015)
12/07/2015	49	NOTICE of Appeal - Interlocutory by Defendant Jose Manuel Gardea re 48 Order. (Herrold, Joseph) Modified text on 12/8/2015 (skm). (Entered: 12/07/2015)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA

United States of America v. Esequiel Gutierrez
Case No. 5:14-cr-04016-MWB-1

RELEVANT DOCKET ENTRIES

Date Filed	#	Docket Text
02/19/2014	2	INDICTMENT as to Esequiel Gutierrez (1) count(s) 1, 2. Voting record in vault. (Attachments: # 1 Unredacted) (des) (Entered: 02/19/2014)
02/20/2014	5	SUPERSEDING Indictment as to Esequiel Gutierrez (1) count(s) 1s. Voting record in vault. (Attachments: # 1 Unredacted) (des) (Entered: 02/20/2014)
05/06/2014	23	MINUTE Entry for proceedings held before Magistrate Judge Leonard T Strand: Change of Plea Hearing as to Defendant Esequiel Gutierrez held on 5/6/2014. Defendant pleaded guilty to count 1 of the Superseding Indictment. Sealed Exhibit filed at 21. Defendant detained. (FTR Gold) (des) (Entered: 05/06/2014)
07/31/2014	35	MINUTE Entry for proceedings held before Judge Mark W Bennett: Sentencing held on

		07/31/2014 as to Defendant Esequiel Gutierrez: Defendant detained: Defense Exhibits A and B (previously filed at Docket 33 and 34) admitted (Court Reporter: Shelly Semmler) (kfs) (Entered: 07/31/2014)
07/31/2014	36	JUDGMENT as to Defendant Esequiel Gutierrez (1): Counts 1 and 2: Dismissed; Count 1s: Defendant committed to BOP for 192 months: Defendant on supervised release for 120 months: $100 special assessment. Signed by Judge Mark W Bennett on 07/31/14. (kfs) (Entered: 07/31/2014)
07/31/2014	37	SEALED Statement of Reasons by USA, Jill Freese, US Probation, Esequiel Gutierrez as to Defendant Esequiel Gutierrez (kfs) (Entered: 07/31/2014)
04/01/2015	39	ORDER Regarding Motion for Sentence Reduction - USSC Amendment as to Defendant Esequiel Gutierrez. This matter comes before the court on its own motion under 18 U.S.C. § 3582(c)(2). At the courts request, the United States Probation Office prepared a memorandum that,

		among other things, addresses the defendants eligibility for a sentence reduction under 18 U.S.C. § 3582(c)(2) and calculates the defendants amended guideline range. The government requests a hearing in this matter. The court declines to hold a hearing at this time. The government is directed to submit by no later than 04/10/15 a sealed report that details its position regarding a reduction in sentence pursuant to 18 U.S.C. § 3582(c)(2). At this point in the proceeding, the defendant need not submit to the court anything that responds to the governments sealed report. The clerk's office is directed to send a copy of this order to the defendant, the office of the Federal Public Defender, the office of the United States Attorney and the office of United States Probation. Signed by Judge Mark W Bennett on 4/1/2015. (copy w/nef to Def; eFPD) (des) (Entered: 04/01/2015)
06/10/2015	42	ORDER as to Defendant Esequiel Gutierrez regarding a reduction in sentence pursuant to 18 U.S.C. § 3582(c)(2). The hearing is set for 08/20/15 at 1:30 PM in SC 3rd Fl

Ct before Judge Mark W Bennett. The clerk's office is directed to appoint counsel of record to represent the defendant and, if counsel of record is not available, the clerk's office is directed to appoint CJA counsel to represent the defendant. At the hearing, appointed counsel shall represent the defendant, who shall participate by telephone. Each party shall file a list of all witnesses who are expected to be called to testify and a list of all exhibits that are expected to be offered by 08/15/15. The clerk's office shall be directed to send a copy of this order to the defendant, the office of the Federal Public Defender, the office of the United States Attorney and the office of United States Probation. Signed by Judge Mark W Bennett on 6/10/15. (Copy w/NEF to Def; eFPD, eCJA) (djs) (Entered: 06/10/2015)

06/16/2015 43 NOTICE *Regarding Resentencing* by USA as to Defendant Esequiel Gutierrez re 42 Order (Wehde, Shawn) Modified text on 6/17/2015 (des) (Entered: 06/16/2015)

11/24/2015	46	ORDER Denying Sentence Reduction - USSC Amendment as to Defendant Esequiel Gutierrez. The resentencing hearing currently scheduled for 12/21/2015 is cancelled. Signed by Judge Mark W Bennett on 11/23/2015. (Attachments: # 1 CR12-3046-MWB Memorandum Opinion and Order) (copy w/nef mailed to defendant) (des) (Entered: 11/24/2015)
12/04/2015	47	NOTICE of Appeal by Defendant Esequiel Gutierrez re 46 Order Denying Sentence Reduction - USSC Amendment (Wingert, Pamela) Modified text on 12/7/2015 (des) (Entered: 12/04/2015)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15-3794

United States of America
Plaintiff-Appellee

v.

Timothy D. Koons
Defendant – Appellant

No. 15-3825

United States of America
Plaintiff-Appellee

v.

Kenneth Jay Putensen
Defendant-Appellant

No. 15-3854

United States of America
Plaintiff-Appellee

v.

Randy Feauto
Defendant-Appellant

No. 15-3880

United States of America

Plaintiff-Appellee

v.

Esequiel Gutierrez

Defendant-Appellant

No. 15-3894

United States of America

Plaintiff-Appellee

v.

Jose Manuel Gardea

Defendant-Appellant

Appeals from United States District Court for the Northern District of Iowa – Sioux City

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Submitted: October 19, 2016
Filed: March 10, 2017

Before WOLLMAN, LOKEN, and BENTON, Circuit Judges.

LOKEN, Circuit Judge.

In these consolidated appeals, five defendants convicted of methamphetamine conspiracy offenses appeal denial of their motions for sentence reductions under 18 U.S.C. § 3582(c)(2). For all five, the initial advisory guidelines range was entirely below the statutory mandatory minimum, and each was sentenced below that minimum after the district court granted government motions for § 3553(e) substantial assistance departures. The question is whether § 3582(c)(2) relief is now available because Amendment 782 to the Guidelines retroactively reduced by two levels the base offense levels assigned to drug quantities, lowering the advisory guidelines range for most drug offenses. We conclude that these defendants are not eligible for a § 3582(c)(2) reduction because their sentences were not "based on" a guidelines range subsequently lowered by the Sentencing Commission. Thus, we affirm the district court's denial of sentencing reductions on a different ground.

I.

In November 2012, Randy Feauto pleaded guilty to conspiracy to manufacture and distribute 50 grams or more of actual methamphetamine and unlawful possession of a firearm. Feauto's advisory guidelines range was 168 to 210 months in prison, but the conspiracy offense mandated a statutory minimum 20-year sentence, which became his guidelines sentence under U.S.S.G. § 5G1.1(b). The government moved for a substantial assistance downward departure. See 18 U.S.C. § 3553(e); U.S.S.G. § 5K1.1. The government recommended a ten percent reduction because Feauto had continued dealing drugs while assisting law enforcement by making controlled buys from drug

dealers. The district court imposed a 132-month sentence, 45 percent below the mandatory minimum.

After Amendment 782 became effective on November 1, 2014, the district court initiated a § 3582(c)(2) proceeding to determine whether Feauto was eligible for a sentence reduction. The United States Probation Office calculated his amended guidelines range to be 121 to 151 months in prison, disregarding § 5G1.1 of the Guidelines, as U.S.S.G. § 1B1.10(c) instructs. Promulgated by the Commission in Amendment 780, § 1B1.10(c) provides, with emphasis added:

> Cases Involving Mandatory Minimum Sentences and Substantial Assistance. If the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the *amended guideline range shall be determined without regard to the operation of § 5G1.1* (Sentencing on a Single Count of Conviction) and § 5G1.2 (Sentencing on Multiple Counts of Conviction).

This appeared to make Feauto eligible for discretionary § 3582(c)(2) relief that could reduce his sentence to as low as 67 months, a reduction comparable to the initial 45 percent substantial assistance reduction. *See* U.S.S.G. § 1B1.10, cmt. n.4.

At the § 3582(c)(2) motion hearing, the district court commented, "I don't see how a retroactive

guideline can essentially trump a mandatory minimum like it does in this case," and ordered briefing on the issue. The government and Feauto agreed he was eligible for a reduction, but disagreed as to whether the district court should exercise its discretion to reduce his sentence. After giving the parties an opportunity to comment on its tentative decision, the court ruled that the Sentencing Commission exceeded its authority in promulgating a guideline, § 1B1.10(c), that nullifies the statutory minimum sentence, or that Congress violated the non-delegation doctrine and separation-of-powers principles if it granted that authority. Accordingly, the district court concluded, Feauto was not eligible for § 3582(c)(2) relief because he "was subject to a mandatory minimum sentence exceeding both his original guideline range and his amended guideline range." *United States v. Feauto*, 146 F. Supp. 3d 1022, 1041 (N.D. Iowa 2015). This decision was consistent with controlling Eighth Circuit precedent prior to the adoption of § 1B1.10(c) in November 2014. *See United States v. Moore*, 734 F.3d 836, 838 (8th Cir. 2013).

The other four appellants were likewise convicted of drug conspiracy offenses mandating statutory minimum sentences greater than their entire advisory guidelines ranges — Timothy Koons (20-year mandatory minimum), Kenneth Jay Putensen (life), Jose Gardea (10 years), and Esequiel Gutierrez (20 years). Each was granted a substantial assistance reduction below the mandatory minimum sentence — Koons to 180 months (25 percent); Putensen to 264 months (35 percent); Gardea to 84 months (30 percent); and Gutierrez to 192 months (36 percent). Amendment 782 lowered their amended guidelines

ranges further below the mandatory minimum, calculated in accordance with § 1B1.10(c). The district court denied § 3582(c)(2) sentencing reductions, relying on its ruling in *Feauto*. These appeals followed. We review defendants' eligibility for § 3582(c)(2) sentence reductions *de novo*. *United States v. Bogdan*, 835 F.3d 805, 807 (8th Cir. 2016).

II.

Providing a rare exception to the finality of criminal judgments, § 3582(c)(2) allows a district court to reduce the sentence of "a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission . . . if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." The applicable policy statement, U.S.S.G. § 1B1.10, provides that a defendant is eligible for a discretionary § 3582(c)(2) reduction if his applicable guidelines range is lowered by a retroactive amendment listed in § 1B1.10(d), such as Amendment 782. *See* U.S.S.G. § 1B1.10(a). The extent of a § 3582(c)(2) reduction is normally limited to the bottom of the amended guidelines range, but if the defendant initially received a sentence below the initial guidelines range by reason of a substantial assistance reduction, "a reduction comparably less than the amended guideline range . . . may be appropriate." § 1B1.10(b)(2)(B).

For a defendant to be eligible for § 3582(c)(2) relief under U.S.S.G. § 1B1.10(a), Amendment 782 must lower his applicable guideline range. A conflict in the circuits developed regarding how to determine eligibility when the applicable guidelines range is

affected by a mandatory minimum sentence. Some circuits held that a retroactive amendment did not have the effect of lowering the defendant's applicable guidelines range because, by reason of § 5G1.1(b), the amended and original range were both determined by the mandatory minimum. *See, e.g.*, *United States v. Joiner*, 727 F.3d 601, 608-09 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1357 (2014); *United States v. Johnson*, 732 F.3d 109, 114-15 (2d Cir. 2013); *United States v. Baylor*, 556 F.3d 672, 673 (8th Cir. 2009). In promulgating § 1B1.10(c), the Commission explained that "circuits are split over what to use as the bottom of the [amended] range." The Commission "generally adopt[ed]" the approach of the Third Circuit and the D.C. Circuit — when a defendant's initial guidelines range was entirely below the mandatory minimum, "the bottom of the amended range [is] . . . the bottom of the Sentencing Table guideline range," disregarding § 5G1.1(b). U.S.S.G. App. C, Amend. 780, at 56 (Supp. 2015), citing *United States v. Savani*, 733 F.3d 56, 66-67 (3d Cir. 2013), and *In re Sealed Case*, 722 F.3d 361, 369-70 (D.C. Cir. 2013).[1] The government's interpretation of § 1B1.10(c) makes defendants eligible for § 3582(c)(2) reductions, contrary to our controlling prior precedents. *See Moore*, 734 F.3d at 838; *Baylor*,

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[1] In deciding these appeals, we accept the Commission's resolution of conflicting judicial interpretations of the term "applicable guideline range" in U.S.S.G. § 1B1.10(a). "[P]rior judicial constructions of a particular guideline cannot prevent the Commission from adopting a conflicting interpretation" provided it does not violate the Constitution or a federal statute and is not plainly erroneous. *Stinson v. United States*, 508 U.S. 36, 46 (1993). The district court concluded that § 1B1.10(c) is constitutionally flawed, an issue we do not address.

556 F.3d at 673. On appeal, the government argues that § 1B1.10(c) requires us to reexamine these precedents and urges us to follow the Fourth Circuit panel majority in *United States v. Williams*, 808 F.3d 253 (4th Cir. 2015). Defendants are eligible for discretionary § 3582(c)(2) reductions, the government argues, because § 3582(c)(2) authorizes a reduction based on a defendant's substantial assistance if it is "consistent with applicable policy statements issued by the Sentencing Commission."

As we noted in *Bogdan*, 835 F.3d at 807, the government, like the Commission, ignores a critical "threshold question" raised by the plain language of § 3582(c)(2), namely, whether each defendant was sentenced "*based on* a sentencing range that has subsequently been lowered by the Sentencing Commission." § 3582(c)(2) (emphasis added); see *Dillon v. United States*, 560 U.S. 817, 821 (2010). Like the defendants in this case, Joseph Bogdan's guidelines range was entirely below the mandatory minimum, and he received an initial sentence below the mandatory minimum for his substantial assistance. We did not answer this threshold question in *Bogdan* because that case turned on the application of the Supreme Court's decision in *Freeman v. United States*, 564 U.S. 522 (2011), to defendant *Bogdan*'s Rule 11(c)(1)(C) plea agreement. But we were "inclined to agree with Fourth Circuit Chief Judge William Traxler that, in this situation, the sentence would not be based on a range the Sentencing Commission subsequently lowered, 'because it was not based on a *sentencing range* in the first instance.'" *Id.* at 808, quoting *Williams*, 808 F.3d at 264 (Traxler, C.J., dissenting). "The more logical interpretation would be

that the [term of imprisonment] was based on the mandatory minimum, not on a guidelines range." *Bogdan*, 835 F.3d at 809.

With the issue now fully briefed and argued, we adhere to our tentative conclusion in *Bogdan*. When the district court grants a § 3553(e) substantial assistance motion and grants a substantial assistance departure to a defendant whose guidelines range is entirely below the mandatory minimum sentence, the court must use the mandatory minimum as the starting point. *See United States v. Billue*, 576 F.3d 898, 904-05 (8th Cir.), *cert. denied*, 558 U.S. 1058 (2009). Any "reduction below the statutory minimum must be based exclusively on assistance-related considerations." *United States v. Williams*, 474 F.3d 1130, 1131 (8th Cir. 2007); *see Feauto*, 146 F. Supp. 3d at 1036, 1039. In these cases, each defendant's prison term was "based on" his statutory mandatory minimum sentence and his substantial assistance. The guidelines range "artificially established by § 5G1.1(b)" depended upon the mandatory minimum. *Bogdan*, 835 F.3d at 809. If § 5G1.1(b) did not exist, the district court would still have set these defendants' sentences at the mandatory minimum before considering a substantial assistance departure. And if initially sentenced today with Amendment 782 in effect, the defendants would be "stuck with that mandatory minimum sentence as a 'starting point' for any substantial assistance reduction." *Feauto*, 146 F. Supp. 3d at 1037. "In essence, the advisory sentencing range became irrelevant." *Williams*, 808 F.3d at 264 (Traxler, C.J., dissenting).

We respectfully decline to follow the Fourth Circuit panel majority in *Williams*. *In United States v. Hood*, 556 F.3d 226 (4th Cir.), *cert. denied*, 558 U.S. 921 (2009), an earlier Fourth Circuit panel concluded: "Because Hood's 240-month Guidelines sentence was based on a statutory minimum and U.S.S.G. § 5G1.1(b), it was not *based on* a sentencing range lowered by Amendment 706, and at this point in the analysis, Hood would not be eligible for a reduced sentence under § 3582(c)(2)." *Hood*, 556 F.3d at 233. Likewise, in *Moore*, 734 F.3d at 838, we held that "Moore's sentence was based on a statutory mandatory minimum term of imprisonment. Accordingly, Amendment 750 does not apply . . . and Moore is not eligible for relief under section 3582(c)(2)." Then-Chief Judge Traxler's dissent in *Williams* specifically relied on *Hood*'s statutory "based on" analysis, 808 F.3d at 265-66, yet the Williams majority concluded that Hood was simply "inapplicable" after Amendment 780, ignoring altogether that "based on" is a statutory prerequisite of § 3582(c)(2) eligibility, *id.* at 261.

The Commission in Amendment 780 also ignored this "based on" statutory requirement, despite numerous circuit court decisions such as *Hood* and Moore that had considered this a critical, if not determinative, issue. For example, in "generally" adopting the Third Circuit and D.C. Circuit "approach," the Commission did not acknowledge the D.C. Circuit's analysis of the "based on" requirement in *In re Sealed Case*, 722 F.3d at 365-66, nor the fact that the Third Circuit in *Savani*, 733 F.3d at 67, after concluding that "applicable guideline range" in § 1B1.10(a)(2)(B) was ambiguous and should be construed in favor of the defendants under the Rule of

Lenity, remanded for consideration of whether defendants' sentences were "based on" a guidelines range in light of *Freeman*. *See also United States v. Glover*, 686 F.3d 1203, 1208 (11th Cir. 2012).

The Commission's failure to consider the meaning of the term "based on" in § 3582(c)(2) is especially perplexing given the Supreme Court's recent decision in *Freeman*. That case turned on whether a defendant who was sentenced in accordance with a Rule 11(c)(1)(C) plea agreement was *ineligible* for a § 3582(c)(2) reduction because his sentence was "based on" the plea agreement, rather than on a lowered sentencing range. Five Justices held that the sentence was based on the plea agreement. *See* 564 U.S. at 535 (Sotomayor, J., concurring), 545 (Roberts, C.J., dissenting). The dissenters acknowledged that a defendant's sentence is "based on" a guidelines range when his Rule 11(c)(1)(C) plea agreement "expressly provid[ed] that the court will sentence the defendant within an applicable Guidelines range." *Id.* at 546. Justice Sotomayor concurred in the result, concluding the defendant is also eligible for relief if the plea agreement "make[s] clear that the basis for the specified [prison] term is [an applicable] Guidelines sentencing range." *Id.* at 539. The plurality, in the minority on this issue, concluded that the sentence imposed pursuant to a Rule 11(c)(1)(C) plea agreement is "based on" the applicable guidelines range considered by the district court in accepting the agreement. *Id.* a 529.

The reasoning *of all nine Justices* in Freeman required a greater substantive relationship between the plea agreement and a guidelines range than the

fictional relationship between a mandatory minimum sentence required by statute and a guidelines "range" determined by § 5G1.1(b). A § 5G1.1(b) artificial range in no substantive way "serves as the basis or foundation for the term of imprisonment." *Id.* at 535 (Sotomayor, concurring). Justice Sotomayor's concurring opinion controls in construing Freeman. *See United States v. Browne*, 698 F.3d 1042, 1045 (8th Cir. 2012), *cert. denied*, 133 S. Ct. 1616 (2013). But all nine Justices construed the term "based on" as imposing a substantive limitation on § 3582(c)(2) relief, a limitation inconsistent with the examples discussed by the Commission in Amendment 780, and with the result reached by the Fourth Circuit majority in *Williams*.

Congress has declared that the Commission's guidelines and policy statements shall "establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code." 28 U.S.C. § 994(b)(1). But the Commission's interpretation of § 3582(c)(2) ignores the statute's plain text as construed in *Freeman* — defendants' sentences were "based on" the mandatory minimum and their substantial assistance, not on "a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. § 3582(c)(2). Once the Supreme Court determines the meaning of a statute, courts "assess an agency's later interpretation of the statute against that settled law." *Neal v. United States*, 516 U.S. 284, 295 (1996). "[T]he Commission does not have the authority to amend [a] statute" the Supreme Court has construed. Id. at 290; see United States v. Stoneking, 60 F.3d 399, 402 (8th Cir. 1995) (en banc). "If the Commission's revised commentary is

at odds with [§ 3582(c)(2)'s] plain language, it must give way." *United States v. LaBonte*, 520 U.S. 751, 757 (1997). Nor can "the Sentencing Commission . . . overrule circuit precedent interpreting a *statutory* provision." *Williams*, 808 F.3d at 266 (Traxler, C.J., dissenting).[2]

For these reasons, we conclude that the defendants are ineligible for § 3582(c)(2) sentencing reductions because their initial sentences were not "based on" a guidelines range lowered by Amendment 782. *Accord United States v. C.D.*, No. 15-3318+, 2017 WL 694483 (10th Cir. Feb. 22, 2017). Accordingly, the district court orders denying § 3582(c)(2) reductions are affirmed.

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[2] The original Commentary to § 5G1.1 stated, more plainly than the amended version, "[i]f the statute requires imposition of a sentence other than that required by the guidelines, the statute shall control." U.S.S.G. App. C, Vol. 1, Amend. 286.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES of America, Plaintiff, v. Randy FEAUTO, Defendant.	No. CR 12–3046 [November 23, 2015]

MEMORANDUM OPINION AND ORDER REGARDING RESENTENCING OF DEFENDANT PURSUANT TO AMENDMENT 782 TO THE UNITED STATES SENTENCING GUIDELINES

MARK W. BENNETT, UNITED STATES DISTRICT COURT JUDGE, NORTHERN DISTRICT OF IOWA.

* * *

I. INTRODUCTION

A. Foreword

Before me for consideration is defendant Randy Feauto's eligibility for a sentence reduction under 18 U.S.C. § 3582(c)(2) in light of Amendment 782, the "All Drugs Minus Two Amendment," to the United States Sentencing Guidelines.[1] The parties and the Federal

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[1] In an Indictment (docket no. 2), handed down September 20, 2012, defendant Randy Feauto was charged with four offenses. **Count 1** charged Feauto with conspiracy to manufacture and distribute 50 grams or more of actual (pure) methamphetamine, after a prior conviction for delivery of a simulated controlled

Defender for the Northern and Southern Districts of Iowa, as invited *amicus curie*, argue that a defendant subject to a mandatory minimum sentence who previously received a "substantial assistance" reduction below that mandatory minimum can be

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substance, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 846, and 851. **Counts 2** and **3** charged Feauto with separate counts of distributing detectable amounts of actual (pure) methamphetamine, after a prior conviction for delivery of a simulated controlled substance, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and 851. **Count 4** charged Feauto with being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

Eventually, on February 22, 2013, Feauto pleaded guilty, before a United States Magistrate Judge, to **Counts 1** and **4** of the Indictment, pursuant to a plea agreement providing for dismissal of **Counts 2** and **3** at sentencing *See* Minutes of Plea Hearing (docket no. 42); Report And Recommendation Concerning Plea of Guilty (docket no. 43). I accepted Feauto's guilty plea by Order (docket no. 47), filed February 22, 2013. At Feauto's sentencing hearing on June 25, 2013, I concluded that Feauto's Base Offense Level, based on at least 50 but less than 150 grams of actual (pure) methamphetamine, was 32; that his Total Offense Level was 33, with a 2–level increase for obstruction of justice, pursuant to U.S.S.G. § 3C1.1, and a 3–level reduction for acceptance of responsibility, pursuant to U.S.S.G. §§ 3E1.1(a) and 3E1.1(b); that his criminal history category was III; and that his advisory guideline sentencing range was 168 to 210 months. However, I also concluded that Feauto's advisory guideline sentencing range was "trumped" by his mandatory minimum sentence of 240 months, pursuant to U.S.S.G. § 5G1.2(b). I then granted the prosecution's motion to reduce Feauto's sentence for "substantial assistance," pursuant to both U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553(e), and imposed a sentence of 132 months, which amounted to a 45% reduction from Feauto's mandatory minimum sentence. *See* Minutes of Sentencing Hearing (docket no. 55); Judgment (docket no. 56); Statement of Reasons (docket no. 57).

resentenced pursuant to Amendment 782 without regard to the mandatory minimum. That position was originally music to my ears, because I have consistently—and vehemently—disagreed with the harshness of most mandatory minimum sentences.[2] In

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[2] Law review articles: Mark W, Bennett, *Slow Motion Lynching? The War on Drugs and Mass Incarceration: Reflections on Doing Kimbrough Justice and a Response to Two Third Circuit Judges*, 66 RUTGERS L. REV. 873 (2014); Mark Osler & Mark W. Bennett, *A "Holocaust in Slow Motion?": America's Mass Incarceration and the Role of Discretion*, 7 DEPAUL J. SOC. JUSTICE 117 (2014): Media interviews: Eli Saslow, *Against His Better Judgment*, WASH. POST, June 7, 2015, at A01, 2015 WLNR 16811322; *Why Mandatory Minimum Sentences on Drug Arrests are "Unfair and Racist,"* HUFFPOST LIVE (May 6, 2014), http://huffingtonpost.com/r/highlight/ mandatory-minimum-sentences-are-unfairandracist/53694529fe34448f9c0006dc; *The Brief*, an Irish radio program podcast worldwide, led by barrister Andrew Robinson. Telephonic interview about mass incarceration and mandatory minimum sentencing in America, July 18, 2013; *The Melissa Harris–Perry Show* (MSNBC television broadcast Nov. 18, 2012); Documentary: THE HOUSE I LIVE IN (ZDF/ITVS/BBC 2012) Eugene Jarecki, director) (Official Selection and Winner, Grand Jury Prize, Sundance Film Festival 2012); Letters to the editor: Mark W. Bennett, *How Mandatory Minimums Forced Me to Send More Than 1,000 Nonviolent Drug Offenders to Federal Prison*, THE NATION, Nov. 12, 2012, at 4; Mark W. Bennett & Mark Osler, *The Wrong People Decide Who Goes to Prison*, CNN (Dec. 3, 2013, 7:49 AM), http://www.cnn.com/2013/12/03/opinion/bennett-osler sentencing index.html?hpt=hp t4; Mark W. Bennett & Mark Osler, *Op–Ed., America's Mass Incarceration: The Hidden Costs*, MINNEAPOLIS STAR TRIBUNE, June 28, 2013, at A11; Judicial opinions: *United States v. Young*, 960 F.Supp. 2d 881, 882 (N.D. Iowa 2013) ("This case presents a deeply disturbing, yet often replayed, shocking, dirty little secret of federal sentencing: the stunningly arbitrary application by the Department of Justice (DOJ) of § 851 drug sentencing enhancements."); *United States v. Hayes*, 948 F.Supp. 2d 1009, 1026 (N.D. Iowa 2013) ("In *United States v. Newhouse*,

fact, in most of the over 1,000 congressionally-mandated mandatory minimum sentences that I have imposed over the past twenty-two years, I have stated on the record that they were unjust and too harsh. I would often inform or remind defendants and their families and supporters in the courtroom that reform of mandatory minimum sentencing must come from the legislative branch of our federal government—Congress. So it is with significant irony, but consistent with my view that only Congress has the authority to waive mandatory minimum sentences (with the exception of substantial assistance motions, pursuant to § 3553(e) and FED. R. CRIM. P. 35(b), and "safety valve" eligibility, pursuant to § 3553(f)), that I disagree with the parties' argument that the Sentencing Commission has the authority to use Amendment 782, or any other amendment to the Sentencing Guidelines, to "nullify" a mandatory minimum sentence established by Congress.

For the reasons set forth below, my understanding is that only Congress itself, not the Sentencing Commission or the Judicial Branch, has that power. Consequently, the proper net effect of Amendment 782, applied either retroactively or prospectively, is

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919 F.Supp. 2d 955 (N.D. Iowa 2013), I questioned whether there is a factual or logical basis for a relatively low amount of methamphetamine to trigger a five-year mandatory minimum."); *United States v. Williams*, 788 F.Supp. 2d 847 (N.D. Iowa 2011) (noting the lack of any rationale for the 18:1 crack-to-powder cocaine ratio under the Fair Sentencing Act, other than compromise, its continuation of the disparities between quantities of crack and powder cocaine that invoke mandatory minimum sentences, and reiterating my adoption of a 1:1 ratio for guideline sentence determinations).

that it can only reduce the sentence of a defendant who originally received a reduction for substantial assistance if he had no mandatory minimum or both his original guideline sentence and his amended guideline sentence are above his mandatory minimum. Feauto is not such a defendant. I fully recognize that, like the vast majority of mandatory minimum sentences themselves, this construction leads to a harsh result, but fidelity to the rule of law and principles of non-delegation and separation of powers trumps any personal views on the harshness of federal sentencing. As discussed below, the construction urged by the parties and *amicus* creates an Alice In Wonderland like scenario in which the retroactive application of Amendment 782 opens a rabbit hole that Feauto, instead of Alice, falls through and receives a lower sentence in Wonderland than if he were originally sentenced today for his crime with the application of post-Amendment 782. Surely, this Mad Tea Party scenario creates the very kind of unwarranted disparity the guidelines were intended to avoid.

B. Resentencing Under Amendment 782

1. Proceedings in this case

Consideration of whether or not defendant Feauto is eligible for a reduction in sentence pursuant to Amendment 782 began in March 2015. At the conclusion of Feauto's "All Drugs Minus Two" hearing on October 23, 2015,[3] I informed the parties that I

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[3] On March 6, 2015, I entered an Order (docket no. 59), *sua sponte*, after reviewing a memorandum (docket no. 60) prepared by the United States Probation Office on Feauto's eligibility for a

would issue a *tentative* opinion for their comment within the next few weeks, before issuing a final opinion. I provided the parties with such a tentative opinion on November 3, 2015. The prosecution and the Federal Defender submitted their comments on November 11, 2015, *see* docket nos. 87 and 89, respectively, and defendant Feauto submitted his

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sentence reduction under 18 U.S.C. § 3582(c)(2) and calculation of his amended guideline range in light of Amendment 782 to the United States Sentencing Guidelines. In that Order, I directed the prosecution to submit a sealed report detailing its position regarding a sentence reduction for Feauto pursuant to 18 U.S.C. § 3582(c)(2). The prosecution filed the required Report (docket no. 61), on March 25, 2015, asserting that no reduction of Feauto's sentence was appropriate, but requested a hearing on the issue. I entered an Order (docket no. 62), on April 10, 2015, setting a hearing on Feauto's eligibility for a sentencing reduction for July 17, 2015, and directed the Clerk of Court to appoint counsel to represent Feauto.

I held an initial hearing on Feauto's eligibility for a sentence reduction on July 17, 2015, but continued the matter for additional briefing by the parties. *See* Minutes Of Hearing on July 17, 2015 (docket no. 69). On July 20, 2015, I entered an Order (docket no. 70) in which I set a briefing schedule on the issue of the proper method for applying retroactive Amendment 782 to the United States Sentencing Guidelines where a mandatory minimum and a substantial assistance departure were both involved in the original sentencing. I also required the defendant to give notice to the Federal Defender, so that the Federal Defender could file an *amicus curie* brief, because my decision might affect many defendants represented by the Federal Defender. I also set the conclusion of Feauto's "All Drugs Minus Two" hearing for October 23, 2015. The prosecution filed its Brief (docket no. 73), on September 4, 2015; the Federal Defender filed its *Amicus Curiae* Brief (docket no. 74), on September 17, 2015; and Feauto filed his Reply Brief (docket no. 81), on September 24, 2015.

comments on November 12, 2015. *See* docket no. 91. This Memorandum Opinion And Order is my final opinion on the matter, which has taken into consideration the parties' original arguments and their comments on my tentative opinion.

2. Resentencing authority

To put the present discussion in context, I will summarize the authority of a court to resentence a defendant in light of subsequent amendments to the Sentencing Guidelines. Congress has provided, *inter alia*, that "[t]he [Sentencing] Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section." 28 U.S.C. § 994(*o*). Congress has also provided authority to reduce a sentence in light of such revisions to the Sentencing Guidelines in 18 U.S.C. § 3582(c). Specifically, § 3582(c)(2) provides, in pertinent part, as follows:

> **(c) Modification of an imposed term of imprisonment.**—The court may not modify a term of imprisonment once it has been imposed except that—
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> * * *
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> **(2)** in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(*o*), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after

> considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. § 3582(c)(2). "The Supreme Court has indicated that a sentence reduction under § 3582(c)(2) is not a 'plenary resentencing'; rather, it operates as 'a narrow exception to the rule of finality' that 'permits a sentence reduction within the narrow bounds established by the Commission.' " *United States v. Anderson,* 686 F.3d 585, 589 (8th Cir. 2012) (quoting *Dillon v. United States,* 560 U.S. 817, 827, 831 (2010)).

3. The pertinent guidelines and policy statements

The pertinent guideline revision here, triggering the possibility of a sentence reduction pursuant to § 3582(c)(2), is Amendment 782 to the Sentencing Guidelines, in which the Sentencing Commission lowered the sentencing range for drug offenders. Amendment 782 became effective November 1, 2014, and was made retroactive effective November 1, 2015. UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL, Vol. 3, Amendment 782, Reasons for Amendment; *United States v. Lawin,* 779 F.3d 780, 781 n. 2 (8th Cir. 2015); *United States v. Thomas,* 775 F.3d 982, 983 (8th Cir. 2014) ("[T]he Commission expressly made Amendment 782 retroactive (effective November 1, 2015)."). Essentially, Amendment 782 "applies retroactively to reduce most drug quantity base offense levels by two levels." *United States v. Lawin,* 779 F.3d 780, 781 n. 2 (8th Cir. 2015) (citing *Thomas,* 775 F.3d at 982). As the

Eighth Circuit Court of Appeals has pointed out, "Amendment 782 amended [U.S.S.G.] § 2D1.1," that is, it amended sentencing ranges determined by drug quantity, but it did not lower the sentencing ranges established on the basis of other offense or offender characteristics, such as "career offender" status under U.S.S.G. § 4B1.1. *Thomas,* 775 F.3d at 983. The Sentencing Commission, itself, expressly stated that the purpose of Amendment 782 was to "change[ ] how the applicable statutory mandatory minimum penalties are incorporated into the Drug Quantity Table while maintaining consistency with such penalties," and that it served this purpose by "reduc[ing] by two levels the offense levels assigned to the quantities that trigger the statutory mandatory minimum penalties, *resulting in corresponding guideline ranges that include the mandatory minimum penalties.*" UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL, Vol. 3, Amendment 782, Reasons for Amendment (emphasis added) (quoted more extensively in footnote 4).[4] Amendment 782 does

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[4] As the Sentencing Commission explained, more fully,

> This amendment changes how the applicable statutory mandatory minimum penalties are incorporated into the Drug Quantity Table while maintaining consistency with such penalties. *See* 28 U.S.C. § 994(b)(1) (providing that each sentencing range must be "consistent with all pertinent provisions of title 18, United States Code"); *see also* 28 U.S.C. § 994(a) (providing that the Commission shall promulgate guidelines and policy statements "consistent with all pertinent provisions of any Federal statute").
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> Specifically, the amendment reduces by two levels the offense levels assigned to the quantities that trigger the

absolutely nothing to reduce the drug quantity that triggers a mandatory minimum.

U.S.S.G. § 1B1.10 is the Sentencing Commission's policy statement concerning reduction in a defendant's term of imprisonment as a result of an amended guideline range, *i.e.*, the companion provision under the Sentencing Guidelines to statutory § 3582(c)(2). As the parties and *amicus* note, this Guideline, as amended to implement Amendment 782, provides as follows:

> (c) *Cases Involving Mandatory Minimum Sentences and Substantial Assistance.*—If

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> statutory mandatory minimum penalties, resulting in corresponding guideline ranges that include the mandatory minimum penalties. Accordingly, offenses involving drug quantities that trigger a five-year statutory minimum are assigned a base offense level of 24 (51 to 63 months at Criminal History Category I, which includes the five-year (60 month) statutory minimum for such offenses), and offenses involving drug quantities that trigger a ten-year statutory minimum are assigned a base offense level of 30 (97 to 121 months at Criminal History Category I, which includes the ten-year (120 month) statutory minimum for such offenses). Offense levels for quantities above and below the mandatory minimum threshold quantities similarly are adjusted downward by two levels, except that the minimum base offense level of 6 and the maximum base offense level of 38 for most drug types is retained, as are previously existing minimum and maximum base offense levels for particular drug types.
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> UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL, Vol. 3, Amendment 782, Reasons for Amendment.

> the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined without regard to the operation of § 5G1.1 (Sentencing on a Single Count of Conviction) and § 5G1.2 (Sentencing on Multiple Counts of Conviction).

U.S.S.G. § 1B1.10(c). In other words, by making § 5G1.1 and § 5G1.2 "inoperative" in specific cases, this policy statement eliminates the guideline provisions that would make the mandatory minimum the guideline sentence, when the mandatory minimum is above the guideline range. The pertinent Application Note explains, further, that the amended sentence should use the same approximate percentage reduction *below the minimum of the amended guideline range* that was used at the original sentencing for a reduction *below the mandatory minimum. See* U.S.S.G. § 1B1.10(c), Application Note 4.[5]

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[5] The pertinent Application Note provides two examples of application of the policy set out in subsection (c):

> *(A) Defendant A is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing was 135 to 168 months, which is entirely above the mandatory minimum, and the court imposed a*

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sentence of 101 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 108 to 135 months. Ordinarily, § 5G1.1 would operate to restrict the amended guideline range to 120 to 135 months, to reflect the mandatory minimum term of imprisonment. For purposes of this policy statement, however, the amended guideline range remains 108 to 135 months.

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant A's original sentence of 101 months amounted to a reduction of approximately 25 percent below the minimum of the original guideline range of 135 months. Therefore, an amended sentence of 81 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 108 months) would amount to a comparable reduction and may be appropriate.

(B) Defendant B is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing (as calculated on the Sentencing Table) was 108 to 135 months, which was restricted by operation of § 5G1.1 to a range of 120 to 135 months. See § 5G1.1(c)(2). The court imposed a sentence of 90 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 87 to 108 months. Ordinarily, § 5G1.1 would operate to restrict the amended guideline range to precisely 120 months, to reflect the mandatory minimum term of imprisonment. See § 5G1.1(b). For purposes of this policy

4. Operation of the policy statement here

The examples in Application Note 4 to U.S.S.G. § 1B1.10(c) do not address the specific circumstance in Feauto's case, where both his original guideline range and his amended guideline range are ***below*** his mandatory minimum sentence of 240 months. Feauto's original guideline range was 168 to 210 months, based on a Base Offense Level of 32, Total Offense Level of 33, and Criminal History Category of III. His amended guideline range, pursuant to Amendment 782, is 135 to 168 months, based on a Base Offense Level of 30, Total Offense Level of 31, and Criminal History Category of III. Thus, both guideline ranges are ***below*** his mandatory minimum sentence. In the absence of U.S.S.G. § 1B1.10(c), as explained in Application Note 4, U.S.S.G. § 5G1.1(b) would make the statutory mandatory minimum of 240 months Feauto's guideline sentence for his

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> *statement, however, the amended guideline range is considered to be 87 to 108 months (i.e., unrestricted by operation of § 5G1.1 and the statutory minimum of 120 months).*
>
> *To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant B's original sentence of 90 months amounted to a reduction of approximately 25 percent below the original guideline range of 120 months. Therefore, an amended sentence of 65 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 87 months) would amount to a comparable reduction and may be appropriate.*

U.S.S.G. § 1B1.10(c), Application Note 4.

resentencing, as it was for his original sentencing. *See* U.S.S.G. § 5G1.1(b) ("Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence."). The parties appear to be correct, however, that, § 1B1.10(c) would require me to consider Feauto's amended guideline range to be 135 to 168 months. I would then be directed to make any reduction for substantial assistance from the low end of the amended guideline range, using the same 45% reduction that I previously gave below his mandatory minimum, ***but now without regard to Feauto's statutory mandatory minimum sentence.***

II. LEGAL ANALYSIS

My concerns in this case are whether the *application* of Amendment 782, as called for in the pertinent policy statements in the Sentencing Guidelines, exceeds the Sentencing Commission's statutory authority and/or violates the nondelegation doctrine rooted in the separation-of-powers principle. A persistent theme in all of the parties' arguments is that the prior substantial assistance motion pursuant to § 3553(e) in Feauto's original sentencing "waived" the mandatory minimum for purposes of his resentencing pursuant to Amendment 782. Yet, that prior "waiver" did not "nullify" the mandatory minimum, because the mandatory minimum remained the starting point for any substantial assistance motion at Feauto's original sentencing. In my view, application of Amendment 782 in the way that the Sentencing Commission has called for does not simply recognize the prior "waiver" of the mandatory

minimum based on substantial assistance, as in the original sentencing. Rather, it is a complete "nullification" or "disregarding" of the mandatory minimum, at resentencing, because the resulting substantial assistance reduction is entirely detached from, or made without regard to, the mandatory minimum. As I pointed out, above, the reason for Amendment 782 was to "change[ ] how the applicable statutory mandatory minimum penalties are incorporated into the Drug Quantity Table while maintaining consistency with such penalties," not to *nullify* such penalties in certain situations or to alter the drug quantity that triggers a mandatory minimum. UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL, Vol. 3, Amendment 782, Reasons for Amendment (quoted more extensively, *supra,* footnote 4). I conclude that a direction to disregard or nullify a statutory mandatory minimum sentence when resentencing a defendant pursuant to Amendment 782 and policy statement U.S.S.G. § 1B1.10(c) exceeds the Sentencing Commission's statutory authority and/or violates the non-delegation doctrine and the separation-of-powers principle. To put it another way, the authority to nullify mandatory minimums is not a power that the Sentencing Commission could usurp or, indeed, one that Congress could delegate. This is so, for several reasons.

A. Limits On The Authority Of The Sentencing Commission

My explanation begins with a brief summary of the non-delegation doctrine and the separation-of-powers principle and the corollary test to determine whether

agency action is *ultra vires.*[6] I recognize, at the outset, that neither the Supreme Court nor the Eighth Circuit Court of Appeals has found any merit in challenges to the Sentencing Guidelines on separation-of-powers grounds. *See, e.g., Mistretta v. United States,* 488 U.S. 361, 412 (1989) (no separation-of-powers violation in congressional delegation of authority to the Sentencing Commission); *United States v. Harris,* 688 F.3d 950, 957 (8th Cir. 2012) ("Every circuit that has considered the separation-of-powers issue has held that '[the] statutory provisions [in 28 U.S.C. § 994 and 18 U.S.C. § 3582(c)] are a sufficient delegation' of Congress's authority to the Sentencing Commission." (quoting *United States v. Garcia,* 655 F.3d 426, 435 (5th Cir. 2011)). In my view, that is not the end of the matter, here.

Rather, as the Supreme Court explained in *Mistretta,* under the separation-of-powers principle, "we long have insisted that 'the integrity and maintenance of the system of government ordained by the Constitution' mandate that Congress generally cannot delegate its legislative power to another Branch." 488 U.S. at 371–72, 109 S.Ct. 647 (quoting *Field v. Clark,* 143 U.S. 649, 692 (1892)). On the other hand, "the separation-of-powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches." *Id.* at 372, 109 S.Ct. 647. The Court applies an "intelligible principle" test to congressional delegations: "So long as Congress 'shall

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[6] *See* BLACK'S LAW DICTIONARY 1662 (9th ed. 2004) (defining *ultra vires*" as "[u]nauthorized; beyond the scope of power allowed or granted").

lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.' " *Id.* (quoting *J.W. Hampton, Jr., & Co. v. United States,* 276 U.S. 394, 409 (1928)). One of the primary reasons that the Supreme Court upheld the Sentencing Guidelines over non-delegation or separation-of-powers objections was this:

> Although the Guidelines are intended to have substantive effects on public behavior (as do the rules of procedure), they do not bind or regulate the primary conduct of the public *or vest in the Judicial Branch the legislative responsibility for establishing minimum and maximum penalties for every crime.*

Mistretta, 488 U.S. at 396 (emphasis added). It follows that, to the extent that specific Guidelines usurp the legislative responsibility for establishing *minimum* penalties for crimes, they violate the non-delegation doctrine and the separation-of-powers principle.

Furthermore, the question of whether actions of an agency or commission are *ultra vires* is whether there is a " 'plain violation of an unambiguous and mandatory provision of the statute.' " *Key Medical Supply, Inc. v. Burwell,* 764 F.3d 955, 962 (8th Cir. 2014) (quoting *Nebraska State Legis. Bd., United Transp. Union v. Slater,* 245 F.3d 656, 659 (8th Cir. 2001)). The dispute over the scope of the agency's authority must involve more than a dispute over statutory interpretation, however. *Id.* It must come down to whether the agency's action was a clear

departure from the statutory mandate or an abridgment of an interested party's statutory right. *Id.*

B. Ultra Vires Action Of The Commission

I find it appropriate to consider, first, whether the Sentencing Commission exceeded its authority in promulgating guidelines and policy statements concerning retroactive application of Amendment 782 that essentially nullify mandatory minimums on resentencing. Also, assuming for the sake of argument that the Sentencing Commission did have the necessary authority, I will consider whether Congress could properly delegate that authority.

1. Departure from the mandate for mandatory minimums

In my tentative opinion, I opined that there can be no serious debate that mandatory minimum sentences are clear and explicit "statutory mandates" that are controlling in the sentencing scheme for federal criminal offenses, subject only to limited exceptions. *See, e.g., United States v. Watts,* 553 F.3d 603, 604 (8th Cir. 2009) (*per curiam*) ("District courts lack the authority to reduce sentences below congressionally-mandated statutory minimums."); *United States v. Chacon,* 330 F.3d 1065, 1066 (8th Cir. 2003) ("[T]he only authority for the district court to depart below the statutorily mandated minimum sentence is found in 18 U.S.C. § 3553(e) and (f), which apply only when the government makes a motion for substantial assistance or when the defendant qualifies under the safety valve provision." (citation omitted)); *see also Key Medical Supply, Inc.,* 764 F.3d at 962 (framing the question of whether an agency exceeded its authority as whether

the agency's action was a clear departure from the statutory mandate or an abridgment of an interested party's statutory right). Much to my surprise, however, the Federal Defender did contest this point.

The Federal Defender asserts that Congress's delegation of the imposition of mandatory minimums to the executive branch, via the executive branch's charging authority and discretion to file notices of enhancement pursuant to 21 U.S.C. § 851, demonstrates that there is no clear statutory mandate that mandatory minimum sentences always be imposed in federal drug cases. It is true that prosecutors could always make mandatory minimum sentences based on drug quantity or § 851 "inoperative" in a particular case by refusing to charge drug quantities or prior conviction enhancements that invoke specific mandatory minimums, or any mandatory minimum at all, no matter what quantity of drugs was involved in the criminal conduct at issue and no matter what a defendant's prior criminal record might be. The ability of a prosecutor to *evade* a mandatory minimum by using the executive branch's well-established discretion in charging criminal offenses does nothing to lessen the statutory mandate for minimum sentences for defendants who *are* charged with and convicted of offenses for which Congress has established mandatory minimum sentences, as Feauto was in this case.

Yet, despite this statutory mandate for certain minimum sentences, U.S.S.G. § 1B1.10(c), as a policy statement implementing Amendment 782, clearly departs f.)m that statutory mandate, because it makes mandatory minimum sentences "inoperative"

in the context of a sentence reduction where a defendant has previously obtained a substantial assistance motion pursuant to both U.S.S.G. § 5K1.1 and § 3553(e). This is a usurpation of congressional responsibility for establishing *minimum* penalties for every crime, contrary to the Sentencing Guidelines as they existed at the time that the Supreme Court rejected non-delegation and separation-of-powers challenges to the Sentencing Guidelines in *Mistretta*. *See* 488 U.S. at 396. Thus, the Sentencing Commission's implementation of Amendment 782 is *ultra vires,* because it is a " 'plain violation of an unambiguous and mandatory provision of the statute[s]' " that create the federal sentencing scheme of mandatory minimum sentences. *See Key Medical Supply, Inc.,* 764 F.3d at 962 (quoting *Slater,* 245 F.3d at 659).

2. Possible sources of a mandate to nullify mandatory minimums

Even assuming that a statute could delegate to the Commission the power to disregard or nullify mandatory minimum sentences without violating the separation-of-powers principle, the statutory authority to do so must come from somewhere, but where? The parties and *amicus* put forward at least three nominees.

a. Section 3553(e)

The parties and *amicus* originally asserted that such statutory authority comes from 18 U.S.C. § 3553(e), the statute that, in the first instance, provides for imposition of a sentence below the mandatory

minimum for substantial assistance. That provision states:

> (e) **Limited authority to impose a sentence below a statutory minimum.**—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. *Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.*

18 U.S.C. § 3553(e) (emphasis added). The parties assert that U.S.S.G. § 1B1.10(c) is a "guideline" or "policy statement" identified in the italicized sentence of § 3553(e), set out above. I disagree. The "guidelines and policy statements" identified in § 3553(e) are plainly those relating to *imposition of a sentence below a mandatory minimum to reflect a defendant's substantial assistance*. This is clear from the reference to "such sentence" in the italicized sentence, which relates to "a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance," in the previous sentence, not to "any sentence." Thus, the pertinent guidelines and policy statements referenced in § 3553(e) are in Chapter 5, Part K, of the Sentencing Guidelines, concerning substantial assistance to authorities. Again, Amendment 782 is *not* an

amendment to the "substantial assistance" guidelines. "Amendment 782 amended [U.S.S.G.] § 2D1.1," that is, it amended sentencing ranges determined by drug quantity, but it did not lower the sentencing ranges established on the basis of other offense or offender characteristics, such as "career offender" status under U.S.S.G. § 4B1.1, *Thomas*, 775 F.3d at 983, or, I would add, sentencing ranges based on or modified by "substantial assistance."

The prosecution argues—correctly—that nothing in § 3553(e) expressly identifies the pertinent guidelines and policy statements as those in Chapter 5, Part K. The prosecution goes on to argue that the plain language of the second sentence of § 3553(e) allows the court to consider other guidelines and policy statements issued pursuant to 28 U.S.C. § 994, such as U.S.S.G. § 1B1.10(c). The prosecution contends that it is significant that § 3553(e) only allows for the application of these guidelines and policy statements to impose a sentence below the mandatory minimum when there is a substantial assistance motion. I am still not persuaded.

Three matters seem extremely odd about the parties' construction of this last sentence of § 3553(e). First, the language of the sentence itself is an extremely convoluted way for Congress to create other unknown future exceptions to its power to create mandatory minimum sentences and exceptions to them, where that power belongs exclusively to Congress under the separation-of-powers principle. *See Mistretta*, 488 U.S. at 396. Nothing in this language even remotely suggests the sweeping power that the parties ascribe to it. Its plain meaning

modifies substantial assistance motions and nothing else. Although the prosecution explains that it is not arguing for a "sweeping construction" of this sentence of § 3553(e) that would apply outside of substantial assistance cases, that does not save its construction. The prosecution still attributes to the statutory language a construction that gives the Sentencing Commission the authority to promulgate policies that sweep away mandatory minimums *as if they did not exist at all* on resentencing, if a substantial assistance motion was filed in the original sentencing. Contrary to the prosecution's view, I find that the much more limited authority provided in the first sentence of § 3553(e) is only to "impose a sentence below a level established by statute as a minimum sentence *so as to reflect a defendant's substantial assistance*." 18 U.S.C. § 3553(e) (emphasis added); *see also United States v. Billue*, 576 F.3d 898, 902–04 (8th Cir. 2009) (in discussing a district court's limited authority under § 3553(e) and § 5K1.1 to impose a sentence below a statutory minimum, emphasizing that, in ruling on the prosecution's downward departure motion based on substantial assistance, a court may consider only factors related to a defendant's substantial assistance to the prosecution, and that, upon reducing a sentence below a statutory minimum, a court may not use § 3553(a) factors to decrease the sentence further). The power under § 3553(e) to reduce a sentence *below* a mandatory minimum is not the power to nullify the mandatory minimum entirely. Rather, it is the power to remove a mandatory minimum as an impediment to a lower sentence specifically "to reflect a defendant's substantial assistance," and only to do so. To put it another way, the power under § 3553(e) is not the

power to impose an amended sentence that entirely ignores the mandatory minimum and that is based in whole or in part on considerations *other than* substantial assistance.

Second, the placement of this alleged sweeping power delegated to the Commission, in a statute authorizing substantial assistance motions, seems even more peculiar. If Congress had intended that future "guidelines and policy statements" create additional exceptions from statutory mandatory minimum sentences, or nullify them, it is improbable that such authority would be placed in the second sentence of a statute authorizing substantial assistance motions. Thus, in my view, both the plain language of the second sentence of § 3553(e) and its placement strongly militate against the sweeping construction suggested by the parties.

Third, if the second sentence in § 3553(e) is construed as broadly as the parties suggest, then nothing would stop the Sentencing Commission, in the guise of reviewing and revising the Sentencing Guidelines pursuant to § 994(*o*), or as a matter of "policy," from directing that any defendant resentenced pursuant to a retroactive guideline amendment pertaining to base offense levels for drug quantities be resentenced to Base Offense Level 1 and Criminal History Category I. While this is, admittedly, an extreme example, there is no limit to the literally thousands of ways that, under the parties' view, retroactive guidelines could create exceptions to congressionally-mandated mandatory minimum sentences. There can be little doubt that such a policy would not only be a clear departure from the statutory

mandate for minimum sentences, but would also be a clear departure from the mandate that the only exceptions to mandatory minimums are in § 3553(e) and (f), for substantial assistance and "safety valve." *See Chacon*, 330 F.3d at 1066 ("[T]he only authority for the district court to depart below the statutorily mandated minimum sentence is found in 18 U.S.C. § 3553(e) and (f), which apply only when the government makes a motion for substantial assistance or when the defendant qualifies under the safety valve provision." (citation omitted)). In the absence of statutory authority to do so—which § 3553(e) does not provide—the Sentencing Commission's implementation of Amendment 782 is *ultra vires*. *See Key Medical Supply, Inc.*, 764 F.3d at 962 (quoting *Slater*, 245 F.3d at 659).

b. Section 3582(c)(2)

Because § 3553(e) does not provide the necessary statutory authority, the Federal Defender has, instead, pointed to § 3582(c)(2) in its comments on the tentative opinion.[7] This is so, even though I had indicated in my tentative opinion that I did not believe that § 3582(c)(2) provides the necessary authority. As I explained in the tentative opinion, the Seventh Circuit Court of Appeals has observed, "Nothing in § 3582(c)(2) permits a court to reduce a sentence below the mandatory minimum." *United States v. Forman*, 553 F.3d 585, 588 (7th Cir. 2009) (*per curiam*),

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[7] In its comments, the Federal Defender did not renew its argument that § 3553(e) provides the required statutory authority for § 1B1.10(c), at least tacitly acknowledging that § 3553(e) does not do so.

overruled on other grounds by United States v. Taylor, 778 F.3d 667 (7th Cir. 2015). Thus, in my view, there is no statutory mandate in § 3852(c)(2) to disregard mandatory minimum sentences upon resentencing. *See Key Medical Supply, Inc.*, 764 F.3d at 962. The Federal Defender argues, however, that once the statutory bar to sentences below a mandatory minimum has been waived by the government's substantial assistance motion pursuant to § 3553(e), § 3582(c) permits the Sentencing Commission to issue policy statements that give courts discretion to reduce a sentence that was based on a guideline range that has now been lowered, and to do so from an amended guideline range that is now *below* the mandatory minimum. This argument is apparently based on the portion of § 3582(c)(2) authorizing the court to make a sentence reduction, "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(2). The Federal Defender appears to argue that § 1B1.10(c) is an "applicable policy statement," specifically related to resentencing pursuant to § 3582(c)(2), and that, therefore, § 1B1.10(c) properly makes "inoperative" on resentencing § 5G1.1, which is the guideline that would otherwise make a mandatory minimum above the guideline range the guideline sentence. Indeed, the Federal Defender argues, it is only the existence of § 5G1.1, and the case law interpreting the guidelines with that provision in place in a substantial assistance context, that necessarily requires that the starting point for the substantial assistance departure be the mandatory minimum term in cases where the guideline range would otherwise be lower. The Federal Defender also cites as support the statement of the

Supreme Court in *Freeman v. United States*, 564 U.S. 522 (2011), that "[t]here is no reason to deny § 3582(c)(2) relief to defendants who linger in prison pursuant to sentences that would not have been imposed but for a since-rejected, excessive range."

I am still not persuaded that § 3582(c)(2) provides the necessary statutory authority. As with § 3553(e), the language of § 3582(c)(2), is an extremely convoluted way for Congress to create unknown future exceptions to its power to create mandatory minimum sentences and exceptions to them, where that power belongs exclusively to Congress under the separation-of-powers principle. *See Mistretta*, 488 U.S. at 396. The language of § 3582(c)(2) is an even more convoluted way of doing so than § 3553(e), because the language of § 3582(c)(2) is silent as to either mandatory minimums or reductions below mandatory minimums for substantial assistance.

I also disagree with the Federal Defender's argument that it is only the existence of § 5G1.1, and the case law interpreting the guidelines with that provision in place in a substantial assistance context, that necessarily requires that the starting point for the substantial assistance departure be the mandatory minimum term in cases where the guideline range would otherwise be lower. To the contrary, it is § 3553(e) that authorizes reductions below the mandatory minimum, and then *only* "to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." 18 U.S.C. § 3553(e); *see, e.g., Billue*, 576 F.3d at 902–04 (in discussing a district court's limited authority under § 3553(e) and § 5K1.1 to impose a

sentence below a statutory minimum, emphasizing that, in ruling on the prosecution's downward departure motion based on substantial assistance, a court may consider only factors related to a defendant's substantial assistance to the prosecution, and that, upon reducing a sentence below a statutory minimum, a court may not use § 3553(a) factors to decrease the sentence further); *United States v. Auld*, 321 F.3d 861, 867 (9th Cir. 2003) (explaining that, where a defendant's mandatory minimum exceeds his guideline sentence, any departure for substantial assistance must be from the mandatory minimum as the sentence that would otherwise have been imposed, because § 3553(e) was controlling). Thus, the "starting point" for a substantial assistance motion pursuant to a § 3553(e) is necessarily the mandatory minimum, at least where the mandatory minimum *exceeds* the guideline range.

Finally, *Freeman* is inapposite. A defendant whose mandatory minimum exceeded his guideline range is not a defendant "linger[ing] in prison pursuant to [a] sentence[ ] that would not have been imposed but for a since-rejected, excessive range." *Freeman*, 564 U.S. 522. Rather, he is a defendant in prison pursuant to a sentence imposed in light of his mandatory minimum and a statutorily-permissible reduction from the mandatory minimum for substantial assistance.

Section 3582(c)(2) does not provide the required statutory mandate to nullify mandatory minimum sentences in the implementation of Amendment 782. Consequently, the Sentencing Commission's implementation of Amendment 782 is *ultra vires*, if

based on § 3582(c)(2). *See Key Medical Supply, Inc.*, 764 F.3d at 962 (quoting *Slater*, 245 F.3d at 659).

c. Section 994(u)

The parties' final nominee as the source of a statutory mandate for the Sentencing Commission's policy for implementing Amendment 782 on resentencing, put forward by the Federal Defender, is 28 U.S.C. § 994(u). That provision states the following:

> (u) If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.

The Federal Defender argues that this statute permits the Sentencing Commission to act as its own lexicographer in removing the applicability of § 5G1.1 in the retroactive implementation of Amendment 782. The Federal Defender argues that all that the Sentencing Commission is attempting to allow in resentencing cases is the application of the retroactive guideline amendment to those defendants who were sentenced pursuant to a guideline range, rather than a guideline sentence, that is now lower by function of the amendment.

The first fallacy with the Federal Defender's last nominee is a now-familiar one: The language of § 994(u) is an extremely convoluted way for Congress to create unknown future exceptions to its power to create mandatory minimum sentences and exceptions

to them, where that power belongs exclusively to Congress under the separation-of-powers principle. *See Mistretta,* 488 U.S. at 396. Like § 3582(c)(2), § 994(u) is silent as to either mandatory minimums or reductions below mandatory minimums for substantial assistance. Furthermore, a defendant whose mandatory minimum exceeded his guideline range was not a defendant sentenced pursuant to a guideline range, but a defendant sentenced pursuant to a mandatory minimum and a statutorily-permissible reduction from the mandatory minimum for substantial assistance. Nothing in § 994(u) authorizes the Sentencing Commission to nullify a mandatory minimum by directing the sentencing court to consider a defendant's amended guideline range below the mandatory minimum, rather than the mandatory minimum, as the starting point for a substantial assistance reduction.

Again, because neither § 994(u), nor any of the parties' other nominees, provides the necessary statutory authority for the Sentencing Commission's action, the Sentencing Commission's implementation of Amendment 782 is *ultra vires. See Key Medical Supply, Inc.,* 764 F.3d at 962 (quoting *Slater,* 245 F.3d at 659).

3. Pernicious Consequences

A further reason that I believe U.S.S.G. § 1B1.10(c) is a policy that clearly departs from the statutory mandate for mandatory minimum sentences is its pernicious consequences. As explained, above, under Amendment 782, using § 1B1.10(c) and Application Note 4, to resentence a defendant who was subject to a mandatory minimum exceeding his

guideline range, but who received a substantial assistance motion permitting him to be sentenced below his mandatory minimum, a resentencing court would consider the defendant's amended guideline range, not his mandatory minimum sentence. The court would then make any reduction for substantial assistance from the low end of the amended guideline range, even if it was below the defendant's mandatory minimum, using the same approximate percentage reduction that the court previously gave, ***without regard to that defendant's statutory mandatory minimum sentence.*** The result is a ***second reduction*** for substantial assistance upon resentencing.

Yet, a defendant being sentenced ***for the first time*** under Amendment 782, who also faces a mandatory minimum sentence exceeding his guideline range and who is eligible for a substantial assistance reduction below his mandatory minimum, is stuck with that mandatory minimum sentence as a "starting point" for any substantial assistance reduction, pursuant to U.S.S.G. § 5G1.1 and § 5G1.2. The result for that defendant is plainly consistent with the statutory mandates for mandatory minimum sentences and the exception for substantial assistance reductions below mandatory minimum sentences. It is also consistent with the purported goal of Amendment 782, which was to amend U.S.S.G. § 2D1.1, which sets sentencing ranges determined by drug quantity, but not to lower the sentencing ranges established on the basis of other offense or offender characteristics. *Thomas,* 775 F.3d at 983. The problem is that such a defendant is treated very differently from a defendant being ***resentenced*** under Amendment 782.

I cannot see how freeing a resentenced defendant from the mandatory minimum before making a substantial assistance reduction, while "tethering" a defendant being sentenced for the first time to his mandatory minimum sentence as the starting point for making a substantial assistance reduction can be anything but a clear departure from the statutory mandate for mandatory minimums. In my view, it is also a clear departure from the statutory mandate for the Sentencing Guidelines, which was, at least in part, to achieve fairness, uniformity, and proportionality. *See, e.g., United States v. Jackson,* 554 F.3d 716, 717 (8th Cir. 2009).[8]

Moreover, the construction urged by the parties creates another anomaly. Those defendants sentenced *to a mandatory minimum* that was either above or below their guideline range who did not cooperate get no relief from Amendment 782. This rewards cooperators a second time solely for their original cooperation and is not tethered to the actual purpose

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[8] To put it another way, disregarding a mandatory minimum sentence on resentencing, where a defendant previously received a substantial assistance motion, seems like "putting the cart before the horse." In every other sentencing scenario, the court would determine, first, the base offense level, which is the only step affected by Amendment 782; next, determine whether the defendant is subject to a mandatory minimum sentence that "trumps" the guideline range; then determine, last, whether any substantial assistance motion permits a reduction from the bottom of his guideline range (or the mandatory minimum operating as the bottom of the guideline range). Section 1B1.10(c), however, makes determination of whether there was a substantial assistance motion the *first* step, entirely skips the second step, and dictates that the amended guideline range is the starting point for any substantial assistance reduction.

of Amendment 782. This further renders the parties' position completely free-floating from the original purpose of Amendment 782—to ameliorate the harshness of the drug guidelines, not to reward cooperators twice. *See* UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL, Vol. 3, Amendment 782, Reasons for Amendment (pertinent portion quoted in footnote 4, *supra*).

Indeed, if Feauto were sentenced for the first time today, with the 2–level reduced base offense level guideline provided by Amendment 782, his total offense level would drop from a 33 to a 31, and his guideline range would drop from his prior 168 to 210 months range to 135 to 168 months. But because Congress has mandated that a defendant in Feauto's position would have a mandatory minimum sentence of 240 months, which is above both his pre-Amendment 782 range and todays' post-Amendment 782 range, he would start at 240 months, receive his 45% substantial assistance reduction, and receive the identical sentence he received prior to the passage of Amendment 782. That is what he would get if he were sentenced for the first time today, and it is exactly what he got when he was originally sentenced on June 25, 2013, before Amendment 782 and the policy statements in § 1B1.10(c). In other words, neither Amendment 782 nor any other guideline or statute provides a way for Feauto to get to the sentence that the parties and *amicus* advocate, if he were sentenced today. Neither the parties nor *amicus* has any response to this anomaly. This anomaly demonstrates to me that the retroactive application of Amendment 782 called for by the Sentencing Commission's policy

statement in § 1B1.10(c) is irrational and, thus, *ultra vires, when applied to drug defendants whose mandatory minimum is above their guideline range.* Of course, if a drug defendant's guideline range is above a mandatory minimum, retroactive application of Amendment 782 could lower a sentence, potentially all the way down to a mandatory minimum, without a substantial assistance motion, or below it, with a substantial assistance motion. This places defendants sentenced prior to the passage of Amendment 782, when applied retroactively, in the identical position if they were sentenced after the effective date of Amendment 782.

Finally, disregarding a mandatory minimum sentence on an Amendment 782 resentencing, using § 1B1.10(c) and Application Note 4, changes the factors that are relevant to the determination of the extent to which a defendant's amended sentence might actually be below his mandatory minimum sentence, at least where the amended guideline range is below the mandatory minimum. This is so, because the amended guideline range is based on the offense and offender characteristics addressed by the Sentencing Guidelines, and the bottom of that amended guideline range would be below the mandatory minimum. Any reduction below the mandatory minimum, in other circumstances, however, must be based *solely* on factors relating to the defendant's substantial assistance. *See, e.g., Billue,* 576 F.3d at 902–04 (in discussing a district court's limited authority under § 3553(e) and § 5K1.1 to impose a sentence below a statutory minimum, emphasizing that, in ruling on the prosecution's downward departure motion based on substantial assistance, a court may consider only

factors related to a defendant's substantial assistance to the prosecution, and that, upon reducing a sentence below a statutory minimum, a court may not use § 3553(a) factors to decrease the sentence further); *United States v. Watts*, 553 F.3d 603, 604 (8th Cir.2009) ("[D]istrict courts may not consider the powder-to-base ratio disparity [in crack cases] when deviating from statutory minimums on consideration of substantial assistance motions under 18 U.S.C. § 3553(e)." (internal quotations and citations omitted)). Thus, disregarding a mandatory minimum sentence on an Amendment 782 resentencing, using § 1B1.10(c) and Application Note 4, is also a clear departure from the statutory mandate in 18 U.S.C. § 3553(e) that reductions below mandatory minimums be based on substantial assistance (and pursuant to § 3553(f), based on "safety valve" eligibility), not anything else.

C. Improper Delegation

The parties and *amicus* argue that, even if there is no specific statutory mandate for the Sentencing Commission's action in implementing Amendment 782 in such a way as to nullify mandatory minimums on resentencing, there is, nevertheless, clear congressional intent to allow the Sentencing Commission to do so. They point out that U.S.S.G. § 1B1.10(c) was an amendment to attempt to preempt the sort of circuit split that occurred in the implementation of the "crack" cocaine guidelines amendments. They also argue that at least some of what I have called "pernicious consequences" were raised in the public comments on the proposed amendment. Thus, the Federal Defender, in particular, argues that, to the extent that such

consequences are permitted to occur, they appear to have congressional support or, at the very least, congressional indifference.

These arguments prove too much. They are, in essence, arguments that *Congress* violated the non-delegation doctrine and the separation-of-powers principle. Again, as the Supreme Court explained in *Mistretta,* under the separation-of-powers principle, "we long have insisted that 'the integrity and maintenance of the system of government ordained by the Constitution' mandate that Congress generally cannot delegate its legislative power to another Branch." 488 U.S. at 371–72 (quoting *Field v. Clark,* 143 U.S. 649, 692 (1892)). As the Supreme Court expressly recognized in *Mistretta,* it is Congress's responsibility to establish minimum and maximum penalties for every crime. *Id.* at 396. The "intelligible principle" test invalidates any delegation of that power to the Sentencing Commission via Amendment 782 and U.S.S.G. § 1B1.10(c), because the parties have not identified, and I have not found, where and how Congress " 'la[id] down by legislative act an intelligible principle to which the [Sentencing Commission] is directed to conform,' " in nullifying mandatory minimum sentences on resentencing pursuant to Amendment 782, such that the delegation would not be forbidden. *Id.* (quoting *J.W. Hampton, Jr., & Co.,* 276 U.S. at 409). As my discussion of the various statutes nominated by the parties as the source of the Sentencing Commission's power to nullify mandatory minimums shows, the parties' reading of those statutes would create a sweeping authority to act, not a direction to conform to any intelligible principle. It follows that, where § 1B1.10(c) usurps the legislative

responsibility for establishing *minimum* penalties for crimes, and assuming, *arguendo,* that Congress has tacitly approved that usurpation, Congress has violated the non-delegation doctrine and the separation-of-powers principle, and § 1B1.10(c) is invalid.

III. CONCLUSION

I conclude that nullifying or disregarding a mandatory minimum sentence on an Amendment 782 resentencing, using § 1B1.10(c) and Application Note 4, is a clear departure from statutory mandates concerning mandatory minimum sentences and reductions below mandatory minimums only for substantial assistance (or "safety valve" relief), and violates the nondelegation doctrine and the separation-of-powers principle. I find no statutory authority, and the parties and *amicus* have identified no convincing nominees, authorizing the Sentencing Commission to promulgate guidelines or policy statements that disregard mandatory minimum sentences. Assuming, *arguendo,* that Congress may be understood to have tacitly approved those guidelines and policy statements, Congress violated the non-delegation doctrine and the separation-of-powers principle. Thus, those guidelines and policy statements purportedly implementing Amendment 782 are in excess of the Commission's statutory authority and in excess of Congress's power to delegate.

Amendment 782 properly changes only a defendant's base offense level, not the effect of his mandatory minimum sentence or his prior substantial assistance. The Sentencing Commission, itself,

explained that the reason for Amendment 782 was to "change[ ] how the applicable statutory mandatory minimum penalties are incorporated into the Drug Quantity Table while maintaining consistency with such penalties," not to *nullify* such penalties in certain situations or to alter the drug quantity that triggers a mandatory minimum. UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL, Vol. 3, Amendment 782, Reasons for Amendment. Thus, the proper net effect of Amendment 782 is that it can only reduce the sentence of a defendant who originally received a reduction for substantial assistance if he had no mandatory minimum or both his original guideline sentence and his amended guideline sentence are above his mandatory minimum. This construction places defendants with mandatory minimum sentences in the identical position if they were sentenced prior to or after the retroactive application of Amendment 782 and achieves the sentencing purpose of avoiding unwarranted sentencing disparity.

Here, because Feauto was subject to a mandatory minimum sentence exceeding both his original guideline range and his amended guideline range, and he has already received a reduction below that mandatory minimum for substantial assistance, I conclude that he is not entitled to any further reduction in his sentence pursuant to 18 U.S.C. § 3582(c)(2) and Amendment 782. Specifically, any substantial assistance reduction on resentencing would properly start from the same point (Feauto's mandatory minimum sentence), consider the same factors, and result in the same percentage reduction from his mandatory minimum sentence, so that the

final sentence would be exactly the same. There is simply no indication that the purpose behind Amendment 782 was to give previously sentenced defendants with mandatory minimum sentences a sentencing break that they would not receive if sentenced today pursuant to Amendment 782.

THEREFORE, defendant Feauto is **denied** a sentence reduction pursuant to Amendment 782 to the United States Sentencing Guidelines and 18 U.S.C. § 3582(c)(2). Because the views expressed in this opinion seem at odds with those of both the defendant and the Department of Justice, and perhaps with those of other judges in the nation, I strongly encourage Mr. Feauto to appeal this ruling. Encouragement, no doubt, he doesn't need.

IT IS SO ORDERED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA, Plaintiff, vs. KENNETH JAY PUTENSEN, Defendant.	No. CR 07-3008-MWB **ORDER REGARDING RESENTENCING OF DEFENDANT PURSUANT TO AMENDMENT 782 TO THE UNITED STATES SENTENCING GUIDELINES**
UNITED STATES OF AMERICA, Plaintiff, vs. TIMOTHY D. KOONS, Defendant.	No. CR 10-4031-2-MWB **ORDER REGARDING RESENTENCING OF DEFENDANT PURSUANT TO AMENDMENT 782 TO THE UNITED STATES SENTENCING GUIDELINES**
UNITED STATES OF AMERICA, Plaintiff, vs. JUAN MANUEL GARDEA, Defendant.	No. CR 14-4017-MWB **ORDER REGARDING RESENTENCING OF DEFENDANT PURSUANT TO AMENDMENT 782 TO THE UNITED STATES SENTENCING GUIDELINES**

UNITED STATES OF AMERICA, Plaintiff, vs. ESEQUIEL GUTIERREZ, Defendant.	No. CR 14-401-MWB **ORDER REGARDING RESENTENCING OF DEFENDANT PURSUANT TO AMENDMENT 782 TO THE UNITED STATES SENTENCING GUIDELINES**

For the reasons set forth in detail in my November 23, 2015, Memorandum Opinion And Order Regarding Resentencing Of Defendant Pursuant To Amendment 782 To The United States Sentencing Guidelines in *United States v. Feauto*, No. CR 12-3046-MWB (docket no. 92), a copy of which is attached,

1. The resentencing hearing for each defendant identified above, currently scheduled for December 21, 2015, is **cancelled**;

2. Each defendant is **denied** a sentence reduction pursuant to Amendment 782 to the United States Sentencing Guidelines and U.S.C. § 3582(c)(2); and

3. I strongly encourage each defendant to appeal this ruling.

IT IS SO ORDERED.

DATED this 23rd day of November, 2015.

/Mark. W. Bennett
MARK W. BENNETT
U.S. DISTRICT COURT JUDGE
NORTHERN DISTRICT OF IOWA

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No.: 15-3794

United States of America
Appellee

v.

Timothy D. Koons
Appellant

No.: 15-3825

United States of America
Appellee

v.

Kenneth Jay Putensen
Appellant

No.: 15-3854

United States of America
Appellee

v.

Randy Feauto
Appellant

No.: 15-3880

United States of America
Appellee

v.

Esequiel Gutierrez
Appellant

No.: 15-3894

United States of America
Appellee

v.

Jose Manuel Gardea
Appellant

Appeal from United States District Court for the
Northern District of Iowa – Sioux City

(5:10-cr-04031-MWB-2)
(3:07-cr-03008-MWB-1)
(3:12-cr-03046-MWB-1)
(5:14-cr-04016-MWB-1)
(5:14-cr-04017-MWB-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Kelly did not participate in the consideration or decision of this matter.

May 25, 2017

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

_____

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA, Plaintiff, vs. TIMOTHY D. KOONS, Defendant. /	Nos. CR00-3041 CR10-4031 TRANSCRIPT OF REVOCATION HEARING and SENTENCING

The Revocation Hearing/Sentencing held before the Honorable Mark W. Bennett, Judge of the United States District Court for the Northern District of Iowa, at the Federal Courthouse, 320 Sixth Street, Sioux City, Iowa, October 15, 2010, commencing at 1:32 p.m.

APPEARANCES

For the Plaintiff: SHAWN S. WEHDE, ESQ.
Assistant United States Attorney
Ho-Chunk Centre - Suite 670
600 Fourth Street
Sioux City, IA 51101

For the Defendant: ROBERT A. WICHSER, ESQ.
Assistant Federal Defender
Suite 400
701 Pierce Street
Sioux City, IA 51101

Also present: Beth Kraemer, U.S. Probation

Reported by: Shelly Semmler, RMR, CRR
320 Sixth Street
Sioux City, IA 51101

(712) 233-3846

[2]

THE COURT: Thank you. Please be seated. Good afternoon. This is United States versus Timothy D. Koons, Criminal Number 10-4031. The defendant's personally present represented by Robert Wichser. And the U.S. Attorney's Office is represented by Assistant U.S. Attorney Shawn Wehde. And we're here for sentencing.

Mr. Wichser, have you had a full, fair, and complete opportunity to review the presentence report with your client?

MR. WICHSER: Yes, Your Honor.

THE COURT: And actually we're also here on a revocation of terms of supervised release, and so have you had a full, fair, and complete opportunity to review the petition for warrant for offender under supervision with your client?

MR. WICHSER: Yes, Your Honor.

THE COURT: And are you contesting any of the – let's see, the one, two, three, four, five, six, seven, eight violations? Are you contesting that at all?

MR. WICHSER: I only have six on my copy.

THE COURT: Well, except one of them there are three separate violations.

MR. WICHSER: Oh, yes. Yes. No, we are not contesting.

THE COURT: Depends on whether you count the right-hand column or the left-hand column.

MR. WICHSER: That's right. I was unfortunately [3] counting the left-hand column.

THE COURT: Left-hand column, you come up with six. You count the right-hand column, you come up with eight because under the first one there's an a, b, and c.

MR. WICHSER: Yes.

THE COURT: Yeah. Are you contesting any of those?

MR. WICHSER: We do not contest those, Your Honor.

THE COURT: Okay. Now, switching back to the presentence investigation report, have you had a full, fair, and complete opportunity to go over the presentence investigation report with Mr. Koons?

MR. WICHSER: Yes, Your Honor.

THE COURT: And you have some objections, but I don't believe I have to rule on any of the objections. You have an objection to the recency point; correct?

MR. WICHSER: Yes, but it has no effect on the guidelines.

THE COURT: It has no effect on the actual guideline calculation, so that's moot. And then you did object to the descriptions in the criminal history category violations, and we just have a disagreement over that, so I guess I could overrule your objection.

MR. WICHSER: Yes, Your Honor.

THE COURT: Yes. And there aren't any other contested guideline issues. [4]

MR. WICHSER: No, Your Honor.

THE COURT: And so do you agree that the total offense level is 31, criminal history category 4,

advisory United States Sentencing Guideline of 151 to 188 months, but those are trumped because there's a mandatory minimum sentence of 20 years or 240 months, and that trumps the advisory guideline range?

MR. WICHSER: That is correct, Your Honor.

THE COURT: And, Mr. Wehde, do you agree with those guideline calculations?

MR. WEHDE: Yes, Your Honor.

THE COURT: And there aren't any contested guideline issues from the government's perspective.

MR. WEHDE: That is correct.

THE COURT: And the only remaining issue I believe is substantial assistance.

MR. WEHDE: That is correct, and we will be making both motions in this case.

THE COURT: Okay. Would you like to do that at this time?

MR. WEHDE: Sure. At this time the United States would move under United States Sentencing Guidelines 5K1.1 and Unite – and 18 United States Code section 3553(e) for a downward departure for the defendant's having provided substantial assistance.

In this case defendant was captured in a traffic stop [5] near Cherokee of – a pound of methamphetamine was seized from him. At the time he was under a degree of surveillance, but more importantly, his source, Codefendant Lupian, was the target of the investigation, was kind of – was under surveillance, the tracker on his vehicle, they had followed him, they had watched a meeting before Mr.

Koons and him when they met, and then they watched him on that occasion.

They stopped Mr. Koons' vehicle, and they seized the pound of methamphetamine and then used the – their overall investigation regarding Mr. Lupian combined with the surveillance of watching the contact between Mr. Lupian and Mr. Koons to – and their seizure of the pound of methamphetamine to write a search warrant for Lupian's residence.

The reason I provide that background is that they also included not only the methamphetamine that was seized which Mr. Koons would have had nothing to do with – that was law enforcement's operation – but they also included a statement that upon his arrest he did give a brief post-Miranda statement and was giving that during the investigation, but they utilized the statement from him that I got – the methamphetamine you just seized came from the guy in that car, didn't have a name.

They put that in the search warrant. That helped support the search warrant of Mr. Lupian's residence. They had quite a bit of other information and surveillance of Mr. Lupian [6] prior to that, but that was the capper, that particular incident, the seizure of the methamphetamine as supported by his statement at that time.

The – at Mr. Lupian's residence we recovered quite a bit of methamphetamine, 3 pounds, quite a bit of cut, $78,000. Mr. Lupian came in right away as did Mr. Koons and did debrief. And so – and both of them pled guilty to that.

So Mr. Koons' information had an impact on the search warrant to some degree, and then he also

provided information about a couple of customers. He also provided information about one particular person, his ex-wife who goes by the same name as his, Cindy Koons, as the person who reintroduced him to this source of supply.

The reason that's a little bit confusing – and I say reintroduced – is because Mr. Koons had had connections with this group, not these particular individuals but some of their higher-ups, eight years before when he had his prior federal offense that is the subject of the TSR violation. So – but Ms. Cindy Koons was using these sources over those years, reintroduces Mr. – Mr. Tim Koons to that source of supply just a month or month and a half before his arrest. So he provides information about her. That's an ongoing investigation at this time as is anything else that he has told us.

Due to the fact that he only was in this essentially about a month and a half, he didn't have a lot of people to talk [7] about. He had about three main customers, and he had Cindy Koons who had introduced him and then the Denison connection that – Mr. Lupian that I've talked about, and he also gave information regarding their – how he acquired the dope, that is, text messages to a couple of individuals with California phone numbers whose names he doesn't – whose names or nicknames he doesn't know. He knows them by a first name which may well be a nickname.

So long story short, those are all in the process of various stages of investigation. The only case that has any real ripeness to – or ability in the future is Cindy Koons. The others are more suspect on what we can or can't do based on ongoing investigations.

We are recommending at this time based on his help in regards to those matters – and I think I failed to state that at his request and his attorney's request we did put Mr. Koons into grand jury on Cindy Koons, and we also put him in the grand jury on the other customers. He had one customer here in South Sioux City and two up in the Emmetsburg or northwest Iowa area whose cases are very suspect as to whether they'll go anywhere, but Mr. Koons wanted to get his grand jury in so he wasn't brought back and had to face issues in prison. So we put him in early on those cases. So he has done that as well.

We are recommending both motions, a 15 percent departure on this case for what he has done to further an [8] investigation of Miss Koons and to provide some partial support for the search warrant in Mr. Lupian's case. The rest of it is a little more – is a little less ripe at this time. And we've discussed the Rule 35 possibilities with both Mr. Koons and his counsel.

THE COURT: What is the likelihood of a Rule 35 motion?

MR. WEHDE: Extremely likely. Ms. Koons is – that case is going to happen. It's just a matter of when it will happen. The other cases are less likely. We have to get a few lucky breaks. Maybe Ms. – and we have to – basically to be honest, we have to have Ms. Koons' cooperation in order to get to that level.

THE COURT: And with regard to Lupian, I assume he would have been charged regardless of whether you actually got the search warrant or not at some point or not necessarily? And what I'm trying to figure out is –

MR. WEHDE: How helpful –

THE COURT: Yes. What's your evaluation under the 5K1.1 factor with regard to how helpful Mr. Koons' information was in getting the search warrant, and would you have gotten Lupian in any event even without Mr. Koons' help?

MR. WEHDE: I think eventually we would have gotten Mr. Lupian whether we had Mr. Koons' help or not because we would have gotten somebody's help. We already had two CIs into [9] that individual already. But what made Mr. Lupian's case is the search warrant. I mean, you catch a guy with 3 pounds of dope, 6 pounds of cut, and $78,000 regardless of his degree of involvement – and there are others involved – that ends – I mean, that forces his – either a plea or cooperation which is what it has forced.

Could we have gotten a search warrant without Mr. Koons' statement that that just came from that guy? Probably because you do the surveillance, you watch what happens, the dope's coming from this car. But it's certainly a lot easier to get if you have the guy who you just grabbed say, "Two minutes ago I just got it from the guy in that car."

So it was helpful. It wasn't crucial, but it was very – I'd have to say it's important. So – and then the search warrant is what made the Lupian case at that time. I mean, you can do a what-if scenario on about anything, but he was helpful in helping secure that search warrant, but the likelihood – getting Mr. Lupian and getting Mr. Lupian to plead probably had more to do with what was found and the other evidence that also – that Mr. Koons basically provided corroboration of.

THE COURT: Any other of the 5K1.1 factors come into play?

MR. WEHDE: Let me check this.

THE COURT: Completely truthful, complete, and [10] reliable in terms of his post-Miranda and grand jury and debriefings?

MR. WEHDE: Just one explanation of that. His post-Miranda statement wasn't – I don't want to say it wasn't truthful. It wasn't complete. We didn't – and that could be in part due because when we debriefed him a short time later we came up with more exchanges between him and Mr. Lupian.

THE COURT: But it's probably a more thorough—

MR. WEHDE: It was a more thoroughly done interview which most debriefings are. So it wasn't complete, but it was truthful to the extent of what was told; and, therefore, it was helpful in regards to Mr. Lupian. But otherwise there would be – his information was timely.

We have no information regarding any threats or those issues. And I think I've detailed the other information.

THE COURT: Okay. Anything else you'd like to add?

MR. WEHDE: No.

THE COURT: Okay. Thank you.

Mr. Wichser, on the nature of the substantial assistance?

MR. WICHSER: Yes, Your Honor. As the Court is well aware, it's difficult to debate with the

government the percentages that they present to the Court because we have no idea as to how those percentages are arrived at. I think that the 15 percent is rather miserly in this case when you compare [11] it to the 5K.1 factors.

Mr. Wehde neglected to point out to the Court that when Mr. Koons testified before the grand jury they gave – Mr. Koons gave a brand new name to the grand jury as well as to the government of a long-time drug trafficker in northwest Iowa that the government has never been able to arrest or convict until several days after Mr. Koons' testimony in the grand jury. They then – officers then went up to the Estherville, Iowa, area and did arrest the person that Mr. Koons talked about. And then he was brought back to the same holding facility that Mr. Koons was in, so there was some danger to Mr. Koons with the placement of this individual.

THE COURT: Now, has that individual been charged in state court or federal court?

MR. WICHSER: Federal court, Your Honor. And then he was for some reason not detained, and then he went back up to the same area where Mr. Koons' – all of his family lives. So I'm pointing that out because that's factor (a)(4) that I think the Court should place some credence in.

THE COURT: Well, it also goes to factor (1) and (3).

MR. WICHSER: Yes.

THE COURT: Let me just kind of interrupt you. What about that, Mr. Wehde?

MR. WEHDE: I do not dispute that Mr. Koons talked about that individual at the time of his witness prep interview [12] for the grand jury. But what I can say is that his information had absolutely – I mean, unfortunately for him had absolutely nothing to do with that individual's arrest. There was a completely different investigation. We already knew of this subject anyway, and Mr. Koons knew that, and his information will be a part of that investigation as it goes forward as well as others that have talked about that person, but we captured that person with a different CI, a buy, and a search warrant that his information had – was not even utilized for due to the timing and due to the timing of that ongoing investigation. They had that in the works before he talked, and they used that information. It was coincidental.

I understand that the timing and I understand the thought process and going forward the fact that that individual may cooperate or may plead may have to some degree – be impacted to some degree by what Mr. Koons knows. But Mr. Koons didn't have any direct contact with that individual. It was basically —

THE COURT: So let me – if I understand this correctly, your office did not give him any credit in terms of your recommendation because it really had nothing to do with it, but it's possible down the road that that may affect either whether to make a Rule 35(b) motion or the extent of – I mean, it could come into play on a Rule 35(b) motion.

MR. WEHDE: Yes. [13]

THE COURT: Okay. Do you dispute that, Mr. Wichser?

MR. WICHSER: No, Your Honor. Of course, I was not at the grand jury. I have no way of knowing.

THE COURT: Right.

MR. WICHSER: I'm just relating what – the discussions I had with my client with respect to this individual.

THE COURT: Sure. And given the close proximity between the information and the arrest, it would certainly be reasonable to draw a conclusion that there was a cause and effect because you're not privy to all of the information that Mr. Wehde is about this independent investigation.

MR. WICHSER: And I also know from experience that this Court is very concerned about danger to existing defendants as well as their family members due to the nature of cooperation and the way that investigations transpire in the Northern District of Iowa.

THE COURT: Right. Okay. I cut you off. Is there anything else you want to add on the extent of your client's substantial assistance?

MR. WICHSER: No, Your Honor.

THE COURT: Why don't we take up the violations of supervised release. Does the government have a sentencing recommendation on that?

MR. WEHDE: Yes, Your Honor. After speaking with U.S. [14] Probation, it's – I guess we're concurring with their recommendation or at least the recommendation that we last knew of which is for, I believe, 12 months consecutive to any term served – any term assessed by the Court in this particular sentencing.

We're asserting to the Court that since it happened – since his new offense involved significant quantities of methamphetamine, half pounds and pound quantities per transaction similar to the weights that were involved back in his earlier case, and the fact that it only was a few short months after he was on release that he was reinvolved, we believe that some term of consecutive time would be appropriate.

I don't recall the maximum, but the 12 months is not the maximum. I believe it may be half of what the maximum may be, and that is U.S. Probation's recommendation, and we are concurring in that recommendation.

THE COURT: Mr. Wichser?

MR. WICHSER: Your Honor, that's a – of course, a policy statement of the guidelines. In view of the nature of the impending sentence with Mr. Koons, the defense would request that the Court consider some combination of concurrent and consecutive with respect to the supervised release violation.

THE COURT: Given the fact that he's looking at a 240-month sentence, it kind of appears to be maybe – in football they call it a penalty for piling on, but, you know, [15] there should be probably some incremental punishment. I understand that.

Mr. Koons, you have the right on both the sentencing on the criminal case and then the violation of supervised release to say anything to me that you want to. You don't have to say anything. You have a right to remain silent. If you exercise your right to remain silent, I will not hold it against you in any way. But if you'd like to say something, I'd be happy to hear from you. Is there anything you'd like to say?

THE DEFENDANT: Yes, Your Honor. Yes, Your Honor.

Your Honor, you know, I take full responsibility for everything I've ever done in my life. I knew better. You know, when I got out of prison, my family supported me, and I let them down.

I want to apologize just to society because, you know, it took 41 years, 42 years to realize that drugs don't do anything but wreck dreams and hopes. I have probably the most wonderful parents in the world. I know I broke my dad's heart. And no matter what the Court gives me for punishment, I'll probably never see him again alive after today. They won't come see me. I don't blame them.

And there's – I got a 14-year-old daughter that's had 5 years with her dad. Now here it is again doing the same thing. People don't under – probably don't know how sorry I am, but I am truly sorry for what I did, and I'm so sorry to [16] society.

And there's one other person I want to say I'm sorry to that she's not here. She's in a drug rehab out in Gordon, Nebraska. Because of me going to jail she relapsed, and I wrecked her life because of that because she had hopes and dreams of spending her life with me. I hope she does well. And I'm sorry, Your Honor, for what I did. Thank you.

THE COURT: Thank you.

Anything either lawyer would like to add?

MR. WICHSER: No, Your Honor.

MR. WEHDE: No, Your Honor.

THE COURT: Okay. On the underlying criminal charge, I find the total offense level is 31, criminal

history category 4, advisory guideline range 151 to 188 months, but there's a mandatory minimum 240-month sentence.

The government's made both substantial assistance motions which allows me to go below the mandatory minimum of 240 months. Government's recommended a 15 percent reduction. If I follow the government's recommendation of 15 percent off of 240 months, would take the sentence down to 204 months.

I think the government's recommendation is a little bit low in this case. It's certainly not unreasonable. It's within the range of what would be reasonable. But I think in light of the fact that Mr. Koons has done both grand jury work and did an initial post-Miranda debriefing, the fact that he's [17] been truthful, complete, and reliable, the fact that his post-Miranda briefing was extremely timely, and that his information led to the – was very instrumental, was of considerable assistance in obtaining the search warrant, undoubtedly the government would have been able to prosecute Mr. Lupian at some point, but getting the search warrant made that case virtually airtight. Defendant really had no choice at that point other than to cooperate if he wanted to reduce his own assistance. So, you know, I think Mr. Koons' information was very significant there.

And so looking at all of the 5K1.1 factors, you know, I'm not convinced that there's really any risk of danger to the family other than the proximity in the same community, and that happens in 90 percent of the cases, and there's hardly ever a risk of danger. So absent some actual threat, I don't think there's any evidentiary basis to find the fourth factor.

So I'm going to grant a 25 percent reduction and reduce the sentence from 240 months down to 180 months and – got a lot of paperwork here, so bear with me.

Oh, I think you wanted to offer the letters, Defendant's Exhibit A.

MR. WICHSER: Yes, Your Honor. I'll offer Defendant's Exhibit A, please.

* * * *

(Defendant Exhibit A was offered.) [18]

* * * *

THE COURT: And I assume there's no objection, Mr. Wehde.

MR. WEHDE: No objection.

THE COURT: Defendant's Exhibit A is received.

* * * *

(Defendant Exhibit A was admitted.)

* * * *

THE COURT: Of course, in this case the 35 – Title 18, 3553(a) factors do not come into play because I'm not allowed to consider those because those could only take me down to the mandatory minimum, and here we start at the mandatory minimum rather than above the mandatory minimum. So I don't even need to make a finding that this sentence is sufficient but not greater than necessary, although I believe a sentence of 180 months is sufficient and not greater than necessary.

So it's my judgment that you are hereby committed to the custody of the Bureau of Prisons to be

imprisoned for a term of 180 months on Counts 1 and 2 to run concurrently.

With regard to the supervised release revocation, I am going to revoke your supervised release. I'm going to impose an additional 12-month sentence, 6 months to run concurrently, 6 months to run consecutively with the sentence that I've just imposed on the underlying case.

Is there a facility you'd like me to recommend, [19] Mr. Wicheser?

MR. WICHSER: Yes, Your Honor. The defendant would respectfully request placement at the federal medical facility in Rochester or, in the alternative, the Federal Correctional Institute in Sandstone, Minnesota.

THE COURT: Well, paragraph 66 of the presentence report, that would be rather inconsistent with a recommendation for Rochester.

MR. WICHSER: Well, Your Honor, the reason that he is seeking Rochester is because he has a certain amount of trade skills that could be used if he could get into the cadre at Rochester rather than be treated as a –

THE COURT: Sure. And you're right. 50 percent of the inmates in Rochester have serious medical problems. The other 50 percent have virtually no medical problems, and they do the work.

MR. WICHSER: Yes.

THE COURT: So okay. With that understanding, I understand. Sure. And what was the back-up? Sandstone?

MR. WICHSER: Yes.

THE COURT: Yeah, okay.

MR. WICHSER: Sandstone, Minnesota.

THE COURT: I'll be happy to recommend Rochester, Minnesota, with a back-up of Sandstone, Minnesota. And the recommendation to Rochester is not based on any medical [20] condition. Matter of fact, it's the opposite. Rochester's very unique. I visited there last August – a year ago August, and you either have to be very sick or not sick at all. If you're kinda sick, you don't get in there. If you have, you know, modest or minor health problems, you're not in there, so they have the healthy group and the not-so-healthy group. But you're right. Half the inmates there are in the healthy group, so that's what I'll recommend.

I'm also going to recommend the 500-hour residential drug treatment program where you can earn up to a year off your sentence if you successfully complete that, although the average inmate last year earned about 8 months off their sentence.

Upon release from imprisonment, you'll be placed on supervised release for 10 years on each count to run concurrently. While you're on supervised release, you can't violate any state, local, or federal law. You can't possess any illegal drugs. You cannot possess a firearm, ammunition, destructive device, or dangerous weapon. You'll never be allowed to possess a firearm or ammunition unless you successfully petition the Bureau of Alcohol, Tobacco, Firearms, and Explosives to have your rights restored. You'll cooperate in the collection of a DNA sample.

You'll have the following special conditions on supervised release. You'll participate in a program of testing and treatment for substance abuse. You're

prohibited from using [21] alcohol and going to bars, taverns, and other establishments whose primary source of income is derived from the sale of alcohol.

And upon release from imprisonment, you'll be placed in a residential reentry center which is a fancy new federal term for a halfway house for up to 120 days. You'll be subject to the standard search condition which means a U.S. probation officer can search your person, residence, automobile, and the like if they have reasonable suspicion you're violating your supervised release.

You don't have the ability to pay a fine, so the fine is waived. There's a special assessment of a hundred dollars on each count for a total of $200.

You're remanded to the custody of the United States marshal to serve this sentence.

I did want to advise you that once you get out if you have another drug conviction in state or federal court and you're sentenced in federal court, you'd have a mandatory life sentence with no possibility of parole.

You do have a right to appeal the sentence that I've imposed. If you decide to appeal, you need to file a written notice of appeal with the clerk of our court no later than 14 days after your judgment is signed. If you can't afford to pay for a lawyer or pay for the costs of an appeal, those costs will be paid on your behalf. [22]

I want to talk to you briefly and explain to your family and friends who are here about this term that we've thrown around that I'm sure Mr. Wichser has talked to you about, and that's a Rule 35(b) motion. That is a substantial assistance motion that occurs after you've been sentenced.

So it is possible that based on the information you provided to the grand jury and, you know, you may be needed in a sentencing proceeding or in a trial, for example, if your ex-wife went to trial, to provide additional information.

The U.S. Attorney's Office is the only office that can make the Rule 35(b) motion on your behalf. Mr. Wichser doesn't have the power to make that on your behalf. I don't have the power to make that on your behalf. Congress has given the U.S. Attorney's Office the sole discretion to make that motion, and they never have to make the motion because it's discretionary. They can decide for whatever reason they want to not to make the motion, or they can make the motion. My impression is that they're very fair in evaluating whether or not to make a Rule 35(b) motion.

And I'm telling you all of this because if the U.S. Attorney's Office does make a Rule 35(b) motion on your behalf, the number-one thing that I will look at – I'll look at all the factors I talked about in deciding to reduce your sentence by 25 percent rather than the 15 percent the government recommended.

But the number-one thing I look at is to make sure [23] that your substantial assistance is truthful because sometimes cooperating defendants – and I certainly understand this, particularly ones that are looking at lengthy sentences like the one you just received – they have a huge incentive to either totally make things up or simply embellish things because they think they're trying to help the prosecutors.

And if I find that you've either made something up or not been a hundred percent truthful, usually I won't give any further reduction at all; or if I do give you a

reduction, it will be much, much smaller than even what the government recommends, and the government doesn't usually recommend a whole lot. So you're either looking at not getting anything off your sentence or a very small amount of time.

So what you've already done in the grand jury is pretty much water over the dam. You're either truthful or you weren't, but any additional substantial assistance, you need to know that if I find that you weren't truthful – and I'm the sole judge of that – I will not reduce your sentence at all or give you a very, very small reduction.

But if the government does make the motion, the Rule 35(b) motion, and if I find that your substantial assistance was truthful, as I sit here today, I don't know of any reason why I would not be willing to give you a further reduction in your sentence.

So I just wanted to make sure you understand the [24] process for a Rule 35(b) motion. And, Mr. Koons, do you have any questions about that?

THE DEFENDANT: No, sir.

THE COURT: Okay. And I know how sorry you are. You know, it's – it's a really, really horrible drug, and it ruins a lot of people's lives, people with good intentions, and I see that almost every day. And I just – the only thought I wanted to leave you with is that, you know, I'm sure you're a good person. I could tell that from the letters, and you just, you know, have a powerful draw to methamphetamine. And I know you don't feel very lucky because I wouldn't exactly call today a lucky day for anybody, particularly getting a long sentence like you received. But you're fortunate in this regard. You have a lot of family support, and

that's what families do. They love people unconditionally. They look past the fact that they've made mistakes. They see the good in you, and there's a lot of good. Everybody – I've only met a handful of people in this courtroom that I didn't think had some good. Lot of them have a lot of good.

But the saddest day of my life – and it's something I will never forget. I've been a United States District Court judge – I'm now in my 17th year which means I started in 19 – I was appointed by the President in 1994. And during my first year I came out to sentence a defendant. She was a female. That was pretty rare back then. Now we see a lot of female [25] defendants, but in '94 it was pretty rare. And she had 5 prior convictions, but when I read her presentence report, I always take a close look at the family, and I noticed that she had 10 brothers and sisters that all lived in the Sioux City area. And when I came out on the bench to sentence her, there wasn't a single person in the back of the courtroom. All of her brothers and sisters had given up on her.

And you're my fourth criminal – fourth or fifth criminal proceeding today. I couldn't even tell you the names of the ones I had this morning because I forget them as fast as I do them. It's kind of my way of coping with the heavy criminal caseload we have. You know, I do a lot of sentencings every week. We're fifth in the nation in terms of number of sentencings per judge of the 94 districts.

And I don't remember that woman's name, but I'll never forget walking out in the courtroom and seeing nobody here because they'd just given up on her.

So as bad of a day as this is for you, the good news is you've got a lot of family support, and that's a really good thing.

So I hope the time passes quickly for you, and good luck to you. And I do hope I have an opportunity to have you back on a Rule 35(b) motion and have an opportunity to reduce your sentence.

Mr. Wichser, is there anything further? [26]

MR. WICHSER: Yes, Your Honor. As you know, the defendant has been detained since the arrest in this case. He has considerable family here today that have come some distance. If it would be all right with the marshals, could you request a brief family visit?

THE COURT: Absolutely. I'm going to request that. Doesn't have to be that brief either. He's going away for a long, long time.

MR. WICHSER: Thank you.

THE COURT: So whatever time the marshals can – they're very busy today. We've had a lot of folks in and out of the courthouse, but this is an important matter, and I'm sure they'll give all the consideration they can to allowing you as much of a visit as they can allow.

Mr. Wichser, anything further?

MR. WICHSER: No. Thank you, Your Honor.

THE COURT: Thank you for your representation.

And, Mr. Wehde, anything further?

MR. WEHDE: No, Your Honor.

THE COURT: Thank you for your representation.

Good luck to you, Mr. Koons.

THE DEFENDANT: Thank you.

THE COURT: We'll be in recess.

(The foregoing sentencing was concluded at 2:13 p.m.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. RANDY FEAUTO, Defendant. /	No. CR12-3046-MWB-1 TRANSCRIPT OF SENTENCING

The Sentencing held before the Honorable Mark W. Bennett, Judge of the United States District Court for the Northern District of Iowa, at the Federal Courthouse, 320 Sixth Street, Sioux City, Iowa, June 25, 2013, commencing at 11:02 a.m.

APPEARANCES

For the Plaintiff:	SHAWN S. WEHDE, ESQ. Assistant United States Attorney Ho-Chunk Centre - Suite 670 600 Fourth Street Sioux City, IA 51101
For the Defendant:	JIM K. MCGOUGH, ESQ. Suite 100 11920 Burt Street Omaha, NE 68154
Also present:	Stacy Sturdevant, U.S. Probation
Reported by:	Shelly Semmler, RMR, CRR 320 Sixth Street Sioux City, IA 51101 (712) 233-3846

[2]

THE COURT: Thank you. Good morning. Please be seated.

THE CLERK: This is Case Number 12CR3046-1, United States of America versus Randy Feauto. Counsel, please state your appearance.

MR. WEHDE: Shawn Wehde for the government.

MR. MCGOUGH: Jim McGough for the defendant.

THE COURT: Good morning. Mr. McGough, have you had a full, fair, and complete opportunity to review the presentence report with your client?

MR. MCGOUGH: I have, Your Honor.

THE COURT: And do you agree that the total offense level is 33, criminal history category 3, the advisory United States Sentencing Guideline range is 168 to 210 months, there's a mandatory minimum 120-month sentence but that's doubled by virtue of the Title 21, section 851 enhancement for the prior state court drug conviction, and so the mandatory minimum becomes 240 months and that trumps the advisory guideline range of 168 to 210 months? Do you agree with that?

MR. MCGOUGH: I do.

THE COURT: Do you have any objections to the presentence report that need to be ruled upon?

MR. MCGOUGH: No, Your Honor.

THE COURT: Would you like to offer your exhibits into evidence at this time? [3]

MR. MCGOUGH: I would, Judge, move to offer Defendant's Exhibits A through D which are the

character letters previously provided to the Court and to the government.

* * * *

(Defendant Exhibits A through D were offered.)

* * * *

THE COURT: Any objection?

MR. WEHDE: No, Your Honor.

THE COURT: A through D are received.

* * * *

(Defendant Exhibits A through D were admitted.)

* * * *

THE COURT: Do you agree with those calculations, Mr. Wehde?

MR. WEHDE: Yes.

THE COURT: And is the United States making a substantial assistance motion?

MR. WEHDE: Yes, we are.

THE COURT: Okay. Would you like to make that at this time?

MR. WEHDE: Yes, Your Honor. In this matter United States moves under United States Sentencing Guideline 5K1.1 and 18 United States Code, section 3553(e) for a downward departure for the defendant's having provided substantial assistance. We are recommending 10 percent reduction in this particular case, [4] and I'll note what the defendant has done and some of the reasons for the consideration of a 10 percent reduction.

Mr. Feauto – the primary work that Mr. Feauto was involved in for which he's granted the motion by

the government is his work in an active capacity. Shortly after his arrest in this case, he agreed to cooperate, and he made several controlled buys in a large Fort Dodge investigation. And by my count he did seven actual buys. He was wired up to make controlled contacts or attempted buys 10 or 12 times, and then there were a number of controlled phone calls that were made to help set up those particular buys.

He made buys directly from four defendants, Ms. Larson, Mr. Kloss, Mr. Greenfield, and Mr. Garrett. Mr. Greenfield and Mr. Garrett were together on their controlled purchase. And ultimately the source for all those individuals or the primary source for all those individuals, Tim Gailey, also showed up during or before or after a number of those buys, and so there was – at least surveillance was able to observe Mr. Gailey being involved, and there was talk with the controlled buys or during the controlled buys that linked Mr. Gailey as the source.

All five of those people were charged. That information was then used in search warrants at a number of places after all those buys, Mr. Gailey's construction company, his car, his residence, and then the residences of the [5] individuals. Only two of those search warrants were of any real value. The construction business, some methamphetamine was seized from Mr. Gailey, Mr. Kloss, and a thir – another party who's been charged by the name of Patrick – Waylon Patrick, and there was some additional evidence found at Ms. Larson's and Mr. Gailey's house.

The last two search warrants at Kloss and Greenfield's, by the time those were done a few days

later, everybody knew what was going on, and so there was nothing found there.

The – while Mr. Feauto was out, near the end there were some difficulties with him, and it was determined for a variety of reasons and information that he was using and buying and selling small quantities of methamphetamine while he was working with law enforcement. He was confronted about this after he was revoked in – off his pretrial release in his debriefing, and he admitted doing some of that buying and selling on the side, so to speak.

And he also debriefed about his – about who he had been dealing with and why he was able to deal with these individuals which we kind of knew about the five already, and he also talked about some other people.

None of the information that he talked about in regards to other people has been used outside of what was in this – the case that I've described. [6]

There is the – there is – a number of those have already been prosecuted. Some of it was fairly dated. Some of them are too small or too dated to be investigated or too remote to be corroborated at least at this time. But there are three targets within there that are continuing to be targets for the government. But we already knew of them as targets at that time.

So – and then about a month after we debriefed Mr. Feauto, we happened to debrief Mr. Greenfield. Now, Mr. Greenfield disclosed some further as I would call it obstructive conduct that we were not aware of until that point, and that was that at that time Mr. Feauto had – there was a scheduled buy, and the actual buy took place on October 31 of 2012. The target was Mr. – Mr. Greenfield and Mr. Garrett were the

targets. And it was learned through Mr. Greenfield that Mr. Feauto approached them which we determined to be outside law enforcement's authority or presence and set up kind of a side deal in which the government got ripped off.

Essentially we were buying an ounce of methamphetamine. The two targets, Mr. Garrett and Mr. Greenfield, came up with some MSM and prepared it so that Mr. Feauto when he got there for the controlled buy and unbeknownst to law enforcement cut the – cut the one ounce with one ounce of meth, one ounce of MSM cut, and then they left the other half ounce there uncut, and that was split between [7] Mr. Garrett and Mr. Greenfield taking a quarter ounce and Mr. Feauto taking a quarter ounce that he retrieved a day or two later from them.

Lack of a better way to describe it, it was what probably often does happen when a middleman's ripping off one side or the other, but in this case the middleman was working with law enforcement, and the people that got ripped off are law enforcement.

The lab reports when they came back provided some corroboration of that because most of the buys in this case that was Tim Gailey's methamphetamine that was going to these various people, Larson, Kloss, et cetera, was around 85, 90 percent. The stuff that came on the October 31 buy was 47 percent which would indicate that it was half the quality.

Mr. Garrett has been recently arrested, but we have not heard his side of the story on this, but we did confront – I mean, essentially I was requested by the U.S. attorney – when we were considering this, I was

requested to reinterview Mr. Feauto to see what his position was on whether that had happened or not.

We did that yesterday, and he did admit that what Mr. Greenfield had described was accurate. And when asked – I'll be honest. When I asked him why he didn't tell us during the debriefing, he said that he was scared that he would get into more trouble and didn't tell us. [8]

Based on all that, we are recommending 10 percent and making a motion. I will indicate to the Court it was a rather animated discussion as to whether to make a motion or not. There was a number of people including the U.S. attorney were very – again, the word I think is reluctantly giving a motion because we do recognize that people do use drugs when we work with them active. We try to prevent that. We try to do it a number of ways. It often happens, and then it has to be dealt with. We do recognize that when people use sometimes they're going to be – I guess the next level is they're buying and selling or they're trading to keep their habit going and to keep their contacts up. That has happened. Obviously that's more serious and more significant.

But this is another level beyond that in the sense of that not only did he do that, but he also ripped – basically ripped off – didn't follow orders, didn't do it with authorization, and basically ripped off the police that he was going to be cooperating or who he agreed to cooperate with.

It presents two problems. One, obviously impeachment. You know, it's disclosed, and, therefore, he is – it provides good fodder for cross-examination should he be a witness. I mean, I hope I never have to

live through that. Granted, though, in this case all codefendants were captured. There was certainly a lot of evidence helped – help – largely helped to be created or obtained by Mr. Feauto's actions. There's [9] surveillance. There's comments. There's dope in hand and then obviously cooperators flipping on cooperators. So there was quite a bit of evidence.

It has not resulted in anybody attacking the case and demanding better deals for it or going to trial or threatening to go to trial. Granted, there are two people that are remaining. One hasn't been captured, and one was recently captured. But all have confessed to date with the exception of the one who's a fugitive. So I do not anticipate in this case having any trials or things of that nature coming out of it.

The other aspect of it is is that obviously we don't want to set a precedent that individuals who work with law enforcement can go against law enforcement, rip off law enforcement, and still get the benefits of their cooperation to a full extent.

I'd have to say the other side of the question then is then why are we making a motion, and I'm going to indicate to the Court that there's been cases I've been before this Court and I've said we're not – you know, somebody made a buy, somebody made an intro, but this is what they did over here, maybe not exactly what was described here, but we're not making a motion because this person damaged cases, did this, that, or the other, and so we're not making the motion.

Where this case is a little bit different is this individual made a big case and did quite a bit of work. As I [10] contact – probably 15 to 20 recorded phone calls, 10 to 12 wired-up one-on-one contacts, and then

7 actual controlled buys as well as describing his previous obtaining of methamphetamine from these individuals on a regular basis for the last number of years.

That in mind, reluctantly we are making the motion because we think we should grant it to some degree but mitigate it to some degree. We do have some precedent with that in other cases that I have been involved in including a case that involved the defendant's sister a number of years ago where we had bad conduct and we also had good conduct and we were able to make a case out of that or case or two out of that case. I don't remember all the specifics, but we did do a mitigated motion of something similar in that case.

Granted, he's done quite a lot in this case. She didn't do quite as much in that case as I recall. But that's the reason for the motions.

I think that's essentially as I would describe it the good, the bad, and the ugly out of this.

Rule 35 possibilities, yes, but because of his impeachment problems, I don't know how valuable that will be. There are some targets out there that he did talk about. But that is, I think, speculative at this point to determine whether or not that that would be something – first of all, whether we'd make those cases and, second of all, whether we would rely [11] upon him in knowing that he would have to be subject to this kind of impeachment information or this impeachment cross-examination in the future. If you have any further questions, I'd be happy to answer them.

THE COURT: Do you have a sense of what the recommendation would have been had he not set up this side deal?

MR. WEHDE: That's a little bit speculative in the sense of that how we would use him in regards to other cases and future cases. That I've already talked to.

But with regard to what he's done, I would suspect, Judge – and this is just an estimation from my point – it'd be somewhere around 50 percent. Because of what he did and the exclusive nature of what he did, sometimes we have two or three people making buys. I mean, we got 90 percent of the evidence in this case from his actions.

THE COURT: So he'd really be in the top tier, how ever you want to define it –

MR. WEHDE: Yes.

THE COURT: – of cooperators, but you've got this huge problem of the obstructive conduct and the side deal.

MR. WEHDE: Yes.

THE COURT: Right. I don't have any more questions for you. Thank you, Mr. Wehde.

What do you think, Mr. McGough? It's an unusual situation. [12]

MR. MCGOUGH: It is. Judge, he was – as the government indicated, he got out on pretrial release. He was doing this active work; okay? So he tests dirty, comes in, and is held.

Now, a lot of times in these kind of situations somebody's doing some active work, maybe they test dirty, but they still have value for law enforcement.

Then we can work out a deal with the government let's get the person into treatment, let's get them the services they need, and let's see if we can rehabilitate them and get them back out there and get the active cooperation.

That didn't happen in Mr. Feauto's case because the government had some of this information at that time that not only was he using, but also we think that he was also obtaining and distributing at that time. So some of this information, maybe the specifics of the Greenfield deal didn't come out until within the last month, but the government knew some of those specifics then.

And so basically a cap was put on the defendant's cooperation at that point. So I think he suffered from his own behavior at that time by him not being in a position anymore where he could continue to cooperate; okay?

So then that led to some additional proffers because now he's in custody, now we know where he is, now let's continue at least the intel. side of it. So that continued some [13] proffers, and that started and continued the negotiations between us and the government in reaching a resolution of the case.

And the other thing that Mr. Feauto's behavior affected him or how it affected him on this case is in negotiating with the government on the 851. The government made it very clear because not only was he testing dirty when he was actively cooperating but we also believe that he was doing stuff on his own that wasn't authorized – he was obtaining methamphetamine; he was distributing

methamphetamine – and so the 851 issue's not even open for discussion.

So again, that's a second way that he brought about his own – his behavior brought about serious and severe impacts on the way his case was handled.

THE COURT: Well, was there some discussion earlier about the government might waive the 851 enhancement?

MR. MCGOUGH: There was. There was. He had some –

THE COURT: What's your experience been about when they waive it and when they don't?

MR. MCGOUGH: Very rare. It's very, very rare in this district. But he did have some intelligence on some other cases. I don't want to get into too much specifics on that, but he did have some intel. on some other cases that the government was extremely interested in. And when he was – when he was originally arrested and appeared at his initial appearance, the [14] government and I had conversations about, look, we want to keep him out, I think he's got some active work, but the government also made it clear to us that he's got some real intel. that could help us on some pretty substantial cases, and the 851 may be in play.

So I understand the Court's point. It's unusual. It doesn't look like it's really an impact, but it ended up – it's our position that it did end up having an impact on this case because of his behavior.

THE COURT: I just want to focus on the 851 enhancement. Are you saying that had he not engaged in this, for lack of a better term, what Mr. Wehde

called a side deal there's a substantial likelihood the government would have waived the 851 enhancement and his mandatory minimum would have been 120 months rather than 240 months? Is that what you're saying?

MR. MCGOUGH: I don't know that I can say that. I think what I can say is at the time that he was held on the violation the government knew that there was other things going on. The government knew it wasn't just a simple act of he was using. The government knew at that point he was doing some of his own deals.

Now, the ins and outs, all of the details of the side deal weren't known until recently. But the government knew at that point that Feauto was doing his own – working off the [15] reservation, so to speak, and kind of doing his own thing.

And the government, as a result of that, told me two things. Number one, we don't care what you come up with. We worked with pretrial considerably in trying to come up with some – for a long period of time trying to come up with some kind of a treatment plan for him to get out because we knew he still had value. Law enforcement still wanted to work with him; at least some of them did. They thought he could do some more active work that could lead to other cases.

But government – when he got picked up, knowing that he was involved in some of these other deals, government made two things clear to me. Number one, they said we're not going to agree to him getting out, treatment or not treatment. We don't care. He's up to some other stuff, and we want to put an end to it. And number two, 851's not a conversation anymore.

So would there have been a substantial likelihood? I don't know. I know that it was a conversation that the government was willing to have with me, that they were having with me. But after he got held on the violation, they made it clear that they didn't want to hear any more about it, that it was going – he was going to have to eat off on the 851 or not or go to trial.

So it's our position it did have an impact at least in the negotiations. Practically did it? I don't know. All I can look at is how it was presented to me which was it's not part of [16] the conversation anymore.

So he's involved in the side deal, and by the government's accounts they – he leads them to four defendants which leads to the source so five cases. Search warrant from those five cases leads to a sixth defendant, so six cases he really makes. Mr. Wehde indicated that one of those six people are in the wind but the other five have either pled or they have a plea hearing scheduled. Doesn't appear that any of them are going to trial.

If it was a situation where Mr. Feauto's actions jeopardized the government's case, then I'd understand the hesitation on giving a motion and might even understand the recommendation that's been offered.

But the government's position on any of their cases, the six cases, the five that are apprehended defendants, the search warrants, the confessions, the scheduled change of plea hearings from not guilty to guilty and one that's currently waiting – that is scheduled. I think Mr. Wehde previously indicated that it was scheduled for yesterday and then it was continued till Friday. So I think all of the government's

cases have been resolved in a way that Mr. Feauto's behavior didn't jeopardize those cases.

Now, there's still precedential value; I get it. But from a valuation from the government to go from 50 percent or in that tier down to a 10 percent recommendation when none of their [17] cases were affected that were for all practical purposes created by the cooperation of Mr. Feauto doesn't make any sense to me. If they had to drop or negotiate differently those cases, then I'd understand their argument to say that he should be penalized for that. But that's not the case here.

As the courts recognize, there's certainly a unique situation. There should be some kind of penalty for what he did. I think there has been. I think him being held by his own actions and not being able to set up a treatment plan and get him back out there despite the fact that at least some law enforcement wanted him to continue to cooperate, I think that basically put a cap on what he could do.

I think there was other cases. I think the government knows that there was other cases that he could have made and other defendants that he could have had apprehended and prosecuted. That didn't happen.

So I think that there's been some penalty already. I think that if the Court takes the government at what they're saying that he would have been in this higher tier, he would have been in the 50 percent range, I'm asking the Court to consider a 35 percent range. I definitely don't think it should be any lower than a 35 percent range. And I think a 35 percent range amounts to a sentence of about 156 months which is about a 13-

year sentence which is still pretty substantial. You look back over his past record, the most he's ever gotten is really a [18] year in jail. His record is replete with issues regarding his addiction to drugs.

And unfortunately, not that it justifies it, but unfortunately, this is kind of the situation of you've got somebody who's got access to it and who has a drug problem. Sometimes they're not going to be able to control themselves and put themselves back in the way of life that they're accustomed to. So that's what we're asking the Court to consider.

THE COURT: Any reply, Mr. Wehde?

MR. WEHDE: No, Your Honor. I think . . .

THE COURT: What about the 851 enhancement? How was that affected in this case?

MR. WEHDE: Again, on a practical level, I don't know. It's a little bit speculative, but I think Mr. McGough characterized it fairly accurately, that it was on the table. It is not – as you know, it's not often on the table. It is on the table in this case. It was. And it was taken off the table at the time that he got revoked off his pretrial release based on, as Mr. McGough said, our knowledge that he was using and he was buying and selling on the side. Obviously at the time we made that decision we did not know about the side deal that I've described.

But it was based on his activities that have been described as buying and selling beyond just mere use and having troubles because there was a discussion. Mr. McGough is a very [19] effective advocate, and he was asking, you know – and there were more things that Mr. Feauto could do. Probably for many of the

same reasons for which he's in trouble with what he did, he's probably looked at as – most people probably didn't think he was working with the cops. He's such a con man, and I'm saying that in this context as a compliment that he's – he was able to – he could buy dope from a lot of people, and he had a lot of contacts and had over his past. And so there were other targets out there that he basically forgave or we forgave because of his conduct.

So it was on the table in regards to the – to this case for a variety of factors, mostly his cooperation, also his record, also his – what the offense was in regard – it was a simulated substance case and such. So all that was on the table, and he lost that because of his conduct.

THE COURT: Do you think you would have been more apt to waive the 851 notice because it was a simulated substance offense –

MR. WEHDE: Probably.

THE COURT: – rather than kind of a large-scale drug trafficking offense?

MR. WEHDE: Again, it's speculation, but I would – I would guess probably, yes.

THE COURT: And when you say it's on the table, I understand what that means. But unlike some negotiations where [20] you can meet halfway on an 851, it's kind of like pregnancy. You can't be partially pregnant. You're pregnant or you're not.

MR. WEHDE: Right.

THE COURT: 851 notice, if you waive it, his mandatory minimum is 10 years. If you don't waive it, it's 20 years. There's no –

MR. WEHDE: There's no real in-between.

THE COURT: – compromise in between.

MR. WEHDE: That is true.

THE COURT: So I'm wondering – and I realize it requires speculation on your part. But it sounds like the type of case where it would have been reasonable and doable for the government to waive the 851 notice. Of course, you might not have because, with all due respect, you do all that in secrecy. There's no policy on it. We never know – unlike a federal judge who has to state their reasons for sentencing, Department of Justice not only doesn't have to but doesn't give a reason why they either waive or file an 851 notice. That's all done in secrecy; right?

MR. WEHDE: Often. I guess the decision is made that way, yes. I think sometimes we've made of record why we have or haven't when there's a discussion at sentencing. I'm not saying in all cases by any means. But otherwise I think you're accurate with that.

THE COURT: Are you in a position to give me odds on [21] what you think, or that's just too speculative?

MR. WEHDE: I think it's pretty – it's relatively speculative here because we didn't get that close to it because when we found out the information was before we even debriefed him in regards to that, and we would have had to have known what his debriefing information was at that – that would have played a role in it as well and – in that regard.

It's very – it's a very difficult assessment to make at that time. Plus I'm actually trying to assess other people other than myself who are involved in that

decision process, and it's not just one – one person makes the decision, but there's input. If it was anything like the 5K discussion that we had in regards to this case, there was a lot of people on both sides on this in regards to it, and there's pluses and minuses to how it would have been evaluated.

THE COURT: Can I ask you this?

MR. WEHDE: Sure.

THE COURT: On the positive sides towards the government potentially waiving the 851 notice, the fact that he was cooperating was a positive.

MR. WEHDE: Would have been a factor, yes, yes.

THE COURT: And the fact that he was cooperating to the extent that the government might have made a 50 percent reduction which is incredibly rare, that's a very positive step towards potentially waiving the 851 notice. [22]

MR. WEHDE: Yes.

THE COURT: Other than the side dealing, were there any negatives that you're at liberty to disclose that would have weighed against the government waiving the 851 enhancement?

MR. WEHDE: Possibly, and that is the debriefing that we did conduct was a difficult debriefing. I wasn't involved in all. I was only involved in the outset of it, but I was also updated in regards to it, and it also dealt with – so he had a tough time admitting his use and dealing on the side. But he ultimately got to it without – but then didn't tell us about the side deal.

But the information that we were looking at – and Mr. McGough's kind of discussed and implied that there was some information regarding a cold case from

ten years before that we were interested in – that information turned out to be less than valuable, and we wouldn't have known that.

Basically the 851 would have been a discussion that would have been in part impacted by how valuable that information would have been in a couple of reasons. One, in a cold case like that which are usually fairly significant cases when you're even considering going back ten years or so in evaluating and using and trying to come up with evidence, you're going to look at it, and you gotta go in knowing that often even with information, even good information, you can't make a case. I mean, it takes a lot of things to fall right. [23]

But to see whether it would take us down a path, that did not turn out to be as valuable as anticipated. It essentially was not valuable. I mean, I shouldn't say it wasn't valuable. It was valuable at least to hear potential target, but it wasn't anything that we could use or do anything with. As the DCI agent said, it's – and he wasn't meaning this in a bad way. It's virtually useless because we can't corroborate it because it doesn't match up with this, this, and this. It isn't that it isn't true. It's just that we can't use it.

And so that may have had some impact on the 851 analysis because we were looking at he might be able to help us out on something that would not result in a prosecution immediately or that could only result in further investigation that may not even culminate with an arrest, and that would have been some of the things that we would have considered in regards to that.

That is the one thing that I could think of. But again, that is rather speculative in nature and how that would have impacted the analysis as well.

THE COURT: Okay. Thank you.

MR. MCGOUGH: Judge, may I respond to that?

THE COURT: Yes, sure.

MR. MCGOUGH: I understand what the government's saying, but in fairness to Mr. Feauto, the difficult proffer came after he violated. The government before we even scheduled [24] that proffer – because during the time he was on pretrial they were using him for active work, so we didn't do the formal proffer until after he was apprehended after the violation. And the formal – before we ever scheduled a formal proffer, the government had already decided that 851 was not open for discussion.

So when the Court asked are there negative factors that the government would have taken into consideration in determining the 851, that decision was already made before the difficult proffer. I just wanted to clarify that.

So that wouldn't have really been a consideration for the government because the government had already decided the 851 was not going to happen because of his behavior, not because he had a difficult proffer. That came later.

THE COURT: Do you disagree with that, Mr. Wehde?

MR. WEHDE: No, Your Honor, but I thought your question was assuming no bad conduct would we have gra – would we have done the 851, and I'm saying – again, we're getting speculative, would the proffer

have been as difficult if we wouldn't have had the bad conduct? That's speculative.

But I think the more – one of the more significant factors would have been how valuable the information regarding that cold case was or wasn't, and I don't think that changes whether he had the bad conduct or not. It just wasn't as valuable as we thought it might be. It still would have been [25] put in the analysis as to whether to do it, and I think some of the things you brought up earlier about the type of case it was, the 851 being a simulated case and he was cooperating, those are more – those are probably more important factors for the 851 analysis.

THE COURT: And this is really just kind of for my own edification, and if I'm treading on trade secrets, you be sure and just say you can't answer the question or pass the question. But is the government in a case where somebody's cooperating more likely to waive a second 851 enhancement than the first 851 enhancement?

MR. WEHDE: I'm doing kind of an analysis in my head, Your Honor. Clearly the second 851 is more often waived than the first when it exists. Some of what goes into that analysis is whether it's a true second or it's a third or a fourth which often happens.

But on a general – generally I think a second 851 is more often waived than the first itself. But I really am having a struggle to try and compare apples and oranges in that regard, so to speak, because – because the analysis with the first 851 or a sole 851 is usually based on some of the factors that we've discussed here.

Again, they're not quite the same analysis. I understand your question and what you're asking, but

I think it probably – the best answer I can give is probably a second [26] 851's easier or more often waived. But there may be other reasons that makes it easier or more often waived than not. So I —

THE COURT: Okay.

MR. WEHDE: I'm doing the best I can.

THE COURT: Sure.

MR. WEHDE: And it's – it's a little bit speculative.

THE COURT: Okay. I appreciate that.

Mr. McGough, anything else you'd like to add?

MR. MCGOUGH: No, Your Honor.

THE COURT: Okay. Mr. Feauto, you have the right to say anything to me you want to. You don't have to say anything. You have a right to remain silent. If you exercise your right to remain silent, I will not hold it against you in any way. If you'd like to say something, I'd be happy to hear what you have to say. Is there anything you'd like to say?

THE DEFENDANT: No, Your Honor.

THE COURT: Okay.

MR. MCGOUGH: Judge, I do have one other issue.

THE COURT: Yes.

MR. MCGOUGH: He's asking for placement as a preference at Oxford. He's also asking for a suggestion or a recommendation to the RDAP program.

THE COURT: Okay. Anything else?

MR. WEHDE: No, Your Honor. [27]

MR. MCGOUGH: No, Your Honor.

THE COURT: Okay. In this case I find the total offense level is 33, criminal history category 3, so the advisory guideline range would be 168 to 210 months. However, there's a mandatory minimum – actually 10 years based on the drug quantity. That doubles to 20 years or 240 months based on the prior felony drug conviction in state court. So we start at a sentence of 240 months.

The government's made a substantial assistance motion which I'm granting. The big issue in the case is how much of a substantial assistance departure the defendant should receive. This is a – this is a tough case.

So I'm going to go through the factors. The timeliness of the defendant's assistance, I – you didn't really directly address that I don't believe, but I assume it's timely because the assistance was active buys, and you do that as it arises. So I assume that's timely.

Any injury suffered or danger or risk of injury to the defendant or his family, nothing specifically in the record, although potential – there's always more potential risk when there's active cooperation, although, on the other hand, law enforcement monitors that very carefully, so it reduces the risk. So I don't see that as a substantial factor.

The third factor – I usually go from the bottom – the nature and extent of the defendant's assistance, very high [28] in this case, seven actual buys, wired ten to twelve times for phone conversations, was responsible for the indictment of at least four or five defendants, helpful information on getting the search warrants. So active work is often held out not as a gold

standard but as the platinum standard, and so very, very high in terms of nature and extent of the assistance.

Truthfulness, completeness, and reliability, apparently he was truthful, complete, and reliable about his cooperation other than his side deal. But when confronted with it I guess as recently as yesterday from what I understand I've been told, he was truthful about it. I suspect if he hadn't been truthful yesterday we might not be here. The sentencing would have been over, and it would have been a 240-month sentence, end of story. The government probably wouldn't have made the motion. And had he hadn't come clean, I'd certainly be inclined to follow the government's 10 percent recommendation. But he did come clean, albeit very, very late in the game.

Then the first factor is my evaluation of the significance and usefulness of the defendant's assistance taking into consideration the government's evaluation of the assistance required. That's a little bit of a tough one because as Mr. McGough points out, while it was potentially an impeachment problem and it might have made Mr. Feauto less believable in front of a jury, everybody's either pled or indicated they're going to plead, so that hypothetical problem for the government [29] didn't arise.

Secondly, I'm not sure that would be such a huge problem for the government to overcome. They'd obviously be better off without it, but I'm not sure that would be that significant of a problem. Not helpful, but if the defendant appeared to be truthful on the other things, I think the fact that he ultimately told the

truth on his side dealing people could understand the side dealing because of his addiction. So I'm not sure it would be a huge problem.

And then we have this whole issue about the 851 which is, you know, somewhat speculative. But had the government waived the 851 enhancement in this case, we'd be starting at 120 months, and had the government recommended 50 percent, we'd be down at 60 months. Of course, there's no assurance the government would have waived the 851 enhancement, but there certainly seems to me to be, based on what I've been told by the lawyers, a reasonable probability. Matter of fact, probably I'd say pretty close to the greater weight of the evidence. By a preponderance of the evidence he might have – I can't say by a preponderance of the evidence he would have been given. I can say by a preponderance of the evidence he might have been given, so I'm going to hedge my bet too. I think Mr. Wehde said it best. It's just kind of speculative.

But he didn't get the 851 enhancement, and that's a decision that only the U.S. Attorney's Office can make. But I [30] just want to point out had he gotten it, we'd be looking at a sentence of 60 months. Even without the 851 enhancement, had he not engaged in the side deal and the government made a 50 percent recommendation, we'd be looking at a 120-month sentence. So I think probably the lawyers in the room, all three of us, agree that there has to be some penalty for this side dealing. We probably have three different views about how much that penalty should be.

I need to go back to you, Mr. Wehde, for a minute. You know, the – if you look at 5K1.1 and the precatory

language in subparagraph (a), the appropriate reduction shall be determined by the Court for reasons stated that may include but are not limited to consideration of the following, and then it's the five factors that I've talked about. Even though they say – even though the rule says – the guideline says may include but are not limited to, I'm not sure the circuit has ever approved anything but the five factors.

So what I'm getting at is it may be permissible for the government to make the determination on the side deal to give a motion or not to give a motion, but I wonder how I should factor it in in looking at the five factors.

The only – the only one that comes into play I think is on the first factor, my evaluation of the significance and usefulness of the defendant's assistance taking into consideration the government's evaluation of the assistance [31] required. And what I hear the government saying is that it made him a less desirable witness because he was involved in the side deal, but they actually never needed him as a witness. And if they do need him in the future, it would make him less desirable. It's a problem that the government would have to overcome. Are you also saying that it affects the second factor, the truthfulness, completeness, and reliability, because he ultimately was truthful about it?

MR. WEHDE: I think it does affect it. I think that he mitigated the – he mitigated the negativeness of that by coming clean after he dried out, so to speak, and after he was confronted. But I think that any time anybody does something – any time anybody lies or any time anybody does something to the degree that

he did in this case that there's always going to be a thought that there may be some unreliability. You wouldn't rely upon him as much as you would somebody that didn't do the activity.

Again, I don't know how far that plays into it when you don't – it's easier to know that when you have an ability to test that by putting him in front of people and questioning him, see how he withstands himself. I'll be honest: He's a good talker, so he could probably handle cross-examination fairly well in regards to – and again, I am giving that as a compliment, not as a detriment. I mean, he has the ability to talk himself out of trouble or talk himself out – explain [32] himself as to what he was doing and why he was doing it, and that may have been less a factor than you can . . .

THE COURT: But it might have made his testimony less reliable in a juror's eyes.

MR. WEHDE: True.

THE COURT: Yeah. Okay. Well, if you look back on the statistics over the last several – even going back five years – every year the sentencing commission publishes a statistical summary of the year in review. And the average drug-trafficking defendant who receives a substantial assistance motion going back over the last 5 years is usually somewhere between 45 and 47-point-something percent in terms of a substantial assistance motion. Of course, it's hard to know what an average cooperator is nationally. I've done sentencings in 4 districts, but there are 90 districts where I haven't done sentencings. But I would suspect by virtue of the fact that the government might have made a 50 percent recommendation that Mr. Wehde would concede that Mr. Feauto was well

beyond what the average cooperator would be certainly in this district because the average cooperator in this district maybe gets a 20 percent recommendation. Do you disagree with that?

MR. WEHDE: I don't know what the average. I might say 25 or 30, but again, that might be just my cases as opposed to the group that I deal with. I would concede – I would concede that he's greater than the average that I see. [33]

THE COURT: Okay. And it could be that. It could be 25 or 30 percent, I agree. Somewhere between 20 and 30 percent most likely. So while I sometimes follow the government's recommendation, sometimes I give less, but more often than not I guess I probably give more than what the government recommends. I gave a 60 percent reduction yesterday in a case where the government – I don't actually remember what they recommended, maybe 30 percent or 40 percent. I'm fairly confident that if we hadn't had this problem with the side dealing I would have given a 60 percent recommendation. So I'm just trying to figure out how much kind of penalty there is for the side dealing.

And so it's just a judgment call in balancing these 5K1.1 factors that we've gone through, but I'm going to impose a sentence of 132 months which is a 45 percent reduction. It's a difficult call, but I'm comfortable with that. It's more than double what the defendant would have received had the government waived the 851 enhancement and made a 50 percent recommendation and I had either followed it or given more. And even if the government hadn't waived the 851 enhancement which nobody knows because it is somewhat speculative, had the government made a 50

percent recommendation off the 240 months, I would have given more.

So in terms of just looking at what the kind of penalty is for the side dealing, I think I've properly taken that into account in analyzing the factors. [34]

So it's my judgment that you are hereby committed to the custody of the Bureau of Prisons to be imprisoned for 132 months. I'm going to recommend Oxford, Wisconsin, also recommend the 500-hour drug treatment program where you can earn up to a year off your sentence if you successfully complete it, although the average inmate last year earned about 8 months off their sentence.

When you're released from prison, you'll be placed on supervised release for 10 years on Count 1, 3 years on Count 4 to run concurrently.

While you're on supervised release, you'll have the standard conditions which include some obvious things like you can't possess or use any illegal drugs. You cannot possess a firearm, ammunition, destructive device, or dangerous weapon. You'll never be allowed to possess a firearm and ammunition unless you successfully petition the Bureau of Alcohol, Tobacco, Firearms, and Explosives to have your rights restored. You'll cooperate in the collection of a DNA sample.

You'll have the following special conditions while you're on supervised release. You'll participate and successfully complete a program for testing and treatment for substance abuse. You'll also participate in any mental health treatment and counselling recommended by your probation officer and take any lawfully prescribed medications.

While you're on supervised release, you're prohibited [35] from using alcohol and going to bars, taverns, and other establishments whose primary source of income is derived from the sale of alcohol. You'll need to obtain verifiable employment that would be preapproved by your probation officer. And finally you'll be subject to the standard search condition which means a United States probation officer can search your person, residence, automobile, personal property, computer, cellphone, camera, and the like if they have reasonable suspicion you're violating your supervised release.

You don't have the ability to pay a fine, so the fine is waived. There's a $200 special assessment which is due and owing. And you can pay that pursuant to the federal Bureau of Prisons' inmate financial responsibility program. You're remanded to the custody of the United States marshal to serve this sentence.

Just wanted to give you a heads-up that if you were to receive another felony drug offense and be sentenced in federal court, your mandatory minimum would be life. And that means, because there is no parole, you would die in a United States prison unless you join that super-exclusive club of people who get Presidential pardons. That club is very teeny.

There's an appeal waiver in this case which means you've given up your right to appeal the sentence that I've imposed unless the sentence that I imposed is illegal or unconstitutional. In those two very limited situations, you [36] would have a right to file a written notice of appeal. And you'd have to file that no later than 14 days from the date your judgment is filed. You

would need to file that with the clerk of our court. And if you can't afford to pay for a lawyer, pay the costs of an appeal, those costs will be paid on your behalf.

Mr. McGough, anything further on behalf of Mr. Feauto?

MR. MCGOUGH: No, Your Honor.

THE COURT: Okay. Thank you for your representation.

And, Mr. Wehde, anything further on behalf of the United States?

MR. WEHDE: No, Your Honor.

THE COURT: Okay. And thank you very much for how thoroughly you answered not only my questions but provided me with all the information that one could ever ask for regarding a very difficult substantial assistance issue. I certainly understand why the government only recommended 10 percent. My – I have no qualms with that recommendation. I just saw the factors differently, but it certainly was a reasonable recommendation, and I appreciate it. Thank you.

Good luck to you. We'll be in recess.

(The foregoing sentencing was concluded at 11:59 a.m.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. KENNETH JAY PUTENSEN, Defendant. /	No. CR07-3008 TRANSCRIPT OF SENTENCING and SUPERVISED RELEASE REVOCATION

The Sentencing held before the Honorable Mark W. Bennett, Judge of the United States District Court for the Northern District of Iowa, at the Federal Courthouse, 320 Sixth Street, Sioux City, Iowa, September 25, 2008, commencing at 2:10 [p].m.

APPEARANCES

For the Plaintiff:	KEVIN C. FLETCHER, ESQ. Assistant United States Attorney Terra Centre - Suite 670 600 Fourth Street Sioux City, IA 51101
For the Defendant:	ALAN G. STOLER, ESQ. Suite 1004 1823 Harney Street Omaha, NE 68102
Also present:	Shane Moore, U.S. Probation
Reported by:	Shelly Semmler, RMR, CRR 320 Sixth Street Sioux City, IA 51101

[2]

THE COURT: Thank you. Please be seated. Good afternoon. This is United States versus Kenneth Jay Putensen, Criminal Number 07-3008. The defendant's personally present represented by Alan Stoler from Omaha. U.S. Attorney's Office is represented by Assistant U.S. Attorney Kevin Fletcher, and we're here for sentencing and also I guess if the parties agree to waive any notice requirements because I just found out about it today but we also have a petition for warrant or summons for offender under supervision. Why don't we defer that till after the sentencing.

Mr. Stoler, have you had a full, fair, and complete opportunity to review the presentence report with your client?

MR. STOLER: I have, Your Honor.

THE COURT: And in this case the total offense level is 34, criminal history category 3, but because of 2 prior drug convictions and the section 851 enhancement, the guideline provision is a mandatory life sentence. Do you agree with that, Mr. Stoler?

MR. STOLER: Yes, Your Honor.

THE COURT: And, Mr. Fletcher, do you agree with those guideline calculations?

MR. FLETCHER: Yes, Your Honor.

THE COURT: And my understanding is that the U.S. Attorney's Office is making a – I guess you'd have to make both substantial assistance motions technically because of the [3] mandatory life sentence, but would you like to be heard on your motions?

MR. FLETCHER: Yes, Your Honor.

THE COURT: Thank you.

MR. FLETCHER: If it pleases the Court, the United States would make a United States guideline section 5K1.1 motion and a Title 18 United States Code section 3553(e) motion concerning the defendant's life sentence. The office is requesting that the life sentence be given of months of 470. I know the Court has – in the Burns case it was found 360, and you found more than 405 or 406 and we've – but recently you've generally been going 405 and 406. And our office it's my understanding is recommending – the 170 (sic) months is I think what we've been recommending, and that's what we're recommending in this case to be consistent with –

THE COURT: Your office has been consistent. I'm the one that's been somewhat inconsistent. It's kind of fluctuating.

MR. FLETCHER: So is the case law, Your Honor.

THE COURT: Yeah. Thank you. And I've pretty much kind of settled in on 406.

MR. FLETCHER: And I understand that. The other thing is that if it's all right I will now proceed with what his substantial assistance was.

THE COURT: Yes. Thank you. [4]

MR. FLETCHER: His substantial assistance is that the defendant debriefed back in September of 2007 pursuant to a federal proffer letter. After he was arrested in July of 2007 up in Minnesota, he obtained private counsel for a short period of time, and then eventually we were able through his state counsel up in Minnesota to get him a proffer letter and get him counsel.

The defendant was willing to cooperate and debriefed. When he got in trouble, he was on supervised release federally here for his prior federal drug conspiracy.

The defendant, what he did was he debriefed, told us what had been going on while he was on supervised release which included not only using meth but dealing and manufacturing in meth including the obtaining of pseudoephedrine pills, et cetera.

He had came to our attention in the investigation – I believe you've sentenced – well, I don't know if you've sentenced – I may be wrong, Your Honor. You may not have sentenced Mr. Roth, Mr. Johnson, or Mr. Wilson. I may be getting them confused. They've pled. I apologize.

The defendant covered his drug dealing and manufacturing and what he was doing including being caught up in the incident in Minnesota. And prior to Minnesota or was it right after – I forget; I apologize – there were search warrants done at his residence in Palo Alto County. I don't [5] remember – recall the town he lived in. I think it was Ruthven, but I could be incorrect. Might have been Mallard or Emmetsburg where they found other methamphetamine manufacturing items such as pseudoephedrine.

The defendant debriefed, and then he was placed in grand jury in December of 2007, and there we had him talk about what he was doing while he was on supervised release and had him talk about Doug Johnson, Mike Roth, and Gary Wilson from the winter of 2005 through February of '07 was his contact with them. Those individuals were involved in a meth

distribution and manufacturing conspiracy, and he knew them and was involved with them.

He discussed the time frame, number of cooks, the quantity of meth per cook, and the pills per cook and the location of the cooks. And those were important because we had not indicted them yet. We had lots of evidence of search warrants, cooperators, and those kinds of things against those three individuals. But the defendant's information tied in with he would also provide them pills and help with the cook, and they kind of helped him.

So he was able to pinpoint times and some of the quantities, and the one location was a cabin that Mike Roth used that's pretty unique, and we were able to corroborate that based upon the physical evidence we already had.

His testimony was used then to indict those three [6] individuals, but he was not the only reason they were indicted.

The defendant also talked about – I'll call them a target – one individual whose source is our target, and this is somebody up in the Lakes area that we're working. His information was given, and it's somebody that we knew about, and we've been able – because of what we knew, he corroborated what we knew, but it hasn't led anywhere yet. And hopefully he will be useful in the future. That's why we're also going to tell you he's a Rule 35 possibility.

And the significance of his test – excuse me, of his assistance was helping us indict those three individuals and the items I just discussed about per cook, time, quantity, and we were able to corroborate his information because of the physical evidence from

those search warrants against those people and other cooperators in that case. But like I – once again, he wasn't the only reason we indicted them.

Truthfulness, completeness, reliability, okay. We were able to corroborate his testimony, like I said, Your Honor, because of the physical evidence of other cooperators.

I'm not aware of any injury, danger, or risk of injury to his family.

In regards to timeliness, he was arrested in Minnesota on a state charge, and then there were search warrants right before or right after in Palo Alto County. About a week later he contacted law enforcement, said he wanted to cooperate [7] because when he was arrested on the 20 – on the 19th of July, he didn't want to talk or cooperate. And the defendant's been in jail then, federal custody, since July of 2007.

And I believe that's everything I have. I'd be glad to answer any questions the Court may have, Your Honor. And we're recommending 10 percent off of that.

THE COURT: The only question I have is you mentioned the three individuals, Johnson, Roth, and Wilson.

MR. FLETCHER: Yes, sir.

THE COURT: And then when I was reviewing the presentence report, there was a fourth individual indicted in the same case number, the 08-4006-MWB case, and that's Philip Schurke, S-c-h-u-r-k-e.

Did Mr. Putensen provide any information with regard to Schurke?

MR. FLETCHER: I didn't put it in here, and my memory as jaded as it can be also and also after the trial, I'm not doing real well today, Judge, just kind of tired like I'm sure you are, is I don't think he talked about Schurke. Schurke was somebody that worked for Roth, and if he did know of him, I don't think it was anything we didn't already know. But my initial reaction is no, Your Honor.

THE COURT: Okay. Thank you.

Mr. Stoler, would you like to comment on Mr. Putensen's substantial assistance? [8]

MR. STOLER: Yes, if I could, Your Honor. I think Mr. Fletcher's accurately portrayed the amount of cooperation that he's done except for the history as far as Mr. Putensen, he was in custody in state court. He was accurate that he did seek representation of counsel and wanted to then enter into cooperation with the government. He did sign a proffer letter. I think it was in early September. I didn't represent him originally. He was represented by Mr. Denne and did a proffer. They actually went to Minnesota to visit with him and to get the information that he first supplied to law enforcement. I think that was in early September of 2007.

He was also willing to act as a – do active cooperation, and efforts were made to try to accomplish that. The practical problem was that he was in state custody in Minnesota and he had the problem with the supervised release violation that was going to be filed here in Iowa, in the Northern District of Iowa, so he didn't actually come into our custody to Iowa until some time – I think it was late December of 2007. And we could not make arrangements to get him

released to do active cooperation. Obviously his situation was such that the government indicated that they would oppose a release to do that active cooperation.

So from a practical standpoint, he didn't do active, but he was willing and would have been able to do active cooperation because the people he was supplying information on [9] were still actively involved in distributing and manufacturing methamphetamine.

THE COURT: Well, do you think I can actually consider 4 that under the 5K1.1 factors? And if so, which factor would it fall under? I would have if I could have?

MR. STOLER: I guess the willingness to be able to do so had the circ – again, if he didn't have the supervised release violation and the government not opposing that, there were some efforts made to try to work that out with the government and through the pretrial service officer. Mr. Sturdevant was contacted and participated in those discussions. But it just became a practical impossibility I guess.

THE COURT: Okay. But which of the factors – I mean, I don't think it comes under any, but if it does, I'd like to know which factor you think it comes under so I can reconsider my view.

MR. STOLER: Well, I would submit that under the willingness to cooperate and the timeliness, it could be looked at from that standpoint that he would be willing to engage in active cooperation on behalf of the government to be considered under that provision under 5K.

The other matter that came up, there was I think some additional clarification that needed to be done and additional information because of – I think of timing on the first [10] proffer. He didn't complete all the information that he had and the details of what he had. So prior to his grand jury testimony, there was actually another proffer that was done here in Sioux City, Iowa, once he came into federal custody.

If you notice, he came in under – I think it was a complaint that was filed because we had to get him into – there had to be something to take him out of state custody in Minnesota to bring him to Iowa.

So when that was accomplished, he did another proffer that went on for at least – my recollection, at least over two hours that he supplied additional information right prior to when he went into the grand jury to give testimony.

There were other individuals he supplied information on that was not the subject matter of the grand jury testimony, but it was more of background information and historical information as well as those individuals that were currently involved in distributing in the Lakes area here in Iowa. So he did – he proffered twice I would submit to the Court as part of his ongoing cooperation.

When we look at timeliness as far as a factor, I would submit that this was prior to indictment. We had to go through an indictment simply because of the process of getting him in to federal custody here in Iowa. Otherwise we had talked about doing actually an information to avoid the time and trouble for the government, but because of the status in another [11] jurisdiction, they needed to indict him to bring him in

on writ. Couldn't bring him in on a writ with just an information.

So that was I think to his credit and should be considered under the factors under 5K as to reasons for a departure, that he was extremely timely immediately or soon after his arrest on a matter in the Minnesota area. He made contacts and sought counsel and signed the proffer to go forward and provide that information. So I think that's a factor to be considered also by the Court as to that standpoint.

THE COURT: Mr. Fletcher, how would you characterize Mr. Putensen's timeliness?

MR. FLETCHER: He didn't want to, first of all, cooperate. And then he's sitting in jail for a while. He did. Like I said, it was just okay. And I agree with the Court that I don't think you can consider willingness to cooperate. That's our position, Your Honor.

THE COURT: Anything else you'd like to add, Mr. Stoler?

MR. STOLER: Not as far as the cooperation. I do want to address the issue of life – the calculation as to life.

THE COURT: Okay. Why don't we take that up.

MR. STOLER: I'm familiar with the cases, too, that have fluctuated as to how you calculate life, and I think in this instance what I would ask the Court to look at is what this gentleman's life expectancy is. He's 42 years old. And he's [12] been in custody since July of '07 on this c – or on a case related to this case.

And looking at a gentleman with – that's currently 42 years of age, I would submit that based upon his history, his medical situation, that he served at least 8

years in custody since he was 16 years of age. At least 8 years out of the last 24 he's served in custody, that somebody of this – somebody such as Mr. Putensen probably has a life expectancy of probably about 30 years. I think the actual calculations for life expectancy for males is somewhere around 72, 73 years as an average life expectancy.

THE COURT: Actually I think it's higher than that. I think it's 76 because I've actually looked at this issue in the past of whether I ought to consider the life expectancy, and I've decided not to do that. But I've certainly looked at it very carefully and given it a lot of thought, and I've decided at least in the past not to do it.

MR. STOLER: Well, and since it is an amorphous figure that we're trying to work with as to what a life sentence would mean based upon —

THE COURT: Well, isn't 406 a reasonable compromise? I mean, you know, I guess there's a reported decision out there affirming me at 360. And I did do some cases where I said 3 – you know, life equals 360. But as I had an opportunity to think about it, I picked 406 because the highest guideline range in [13] the advisory United States Sentencing Guidelines is 405 to life. And that's why I've kind of settled in on 406.

It seems to me 360 is inappropriate because there's a 405-to-life guideline range, and 360 is actually the lowest range that includes a life sentence I believe, 360 to life.

So kind of after doing unfortunately a number of life sentences and having to pick a starting point for what life means, it seems to me the most logical one

and really the one that's most generous to the defendant that makes – that also makes the most sense to me is one month greater than the maximum monthly range mentioned in the guidelines, and that would be 405 months. One month greater is 406 months. And I'm just telling you the rationale of why I've selected it. And I have not been entirely consistent. The U.S. Attorney's Office has. I think every time this issue has come up during my 14-plus years now, they've taken the position that it's 470.

So why is 406 inappropriate?

MR. STOLER: Well, in looking at the guidelines, the highest guidelines would be 360 to life. The 405 is a cap that's indicated as a number of years or as a number of months as far as ultimate sentence. The highest range is 360 to life. There isn't a 405 to life. There's a 360 to life as to the range, so looking at the bottom end of a guideline sentence that covers a maximum up to life, I looked at the 360 as the starting point to be looked at from that type of a sentencing range. [14]

THE COURT: Well, yeah. I guess the 405 is the high end of the highest range that doesn't include a life sentence. Would that be right?

MR. STOLER: That's correct.

THE COURT: Well, why would it be fair to go to the high end of the guideline r – let's say you had a total offense level 39, criminal history category 3 and maybe you thought the criminal history was overrepresented – I'm sorry, underrepresented but not substantially underrepresented so you didn't do a upward departure, but for whatever reason there were aggravating factors maybe under the 3553(a) analysis

and you would go to the high end of the guideline range of 405 months. Why would it be fair then when somebody has a mandatory life sentence to turn around and use 360 as life which is 45 months less than somebody who got a within-range guideline sentence that did not include life? Are you tracking me?

MR. STOLER: I'm tracking you, and it's difficult to argue when we're talking about ranges of how you calculate a sentence that is a number of months. The example that you gave, maybe in the situation the person went to trial, had a significant criminal history that wasn't taken into account as you've described, and because of those types of factors you – Court felt that it was appropriate to give the high end of the guideline range.

I haven't seen in a case that I've been involved in [15] that involves a plea and a cooperator that avoids a trial and avoids all that's attendant to that that would be sentenced at the high end of a guideline range based upon those factors.

THE COURT: Well, I have sentenced cooperators at the high end of the guideline range before, not very often, but I've certainly done it, you know, more than a handful of times.

Anything else you'd like to add?

MR. STOLER: Not as to that issue, no.

THE COURT: Mr. Fletcher, anything else you'd like to add?

MR. FLETCHER: No, Your Honor.

THE COURT: Mr. Putensen, you have the right to say anything to me you want to before I impose

sentence. You don't have to say anything. You have a Fifth Amendment right under the United States Constitution to remain silent. If you exercise your right to remain silent, I cannot and will not hold that against you in any way. But if you'd like to say something, I'd be happy to hear from you. Is there anything you'd like to say?

THE DEFENDANT: Yes, Your Honor. I just wanted to say how ashamed —

THE COURT: Can you move that microphone a little bit closer? Maybe Mr. Stoler could assist you. Thank you.

THE DEFENDANT: I want to tell you how much I'm ashamed of what I've done to society, against society again. [16] I'm – I can't believe that I got wrapped up into this stuff again. I was doing good. I got out in 2002, the end of 2002. I made it 2003, 2004. I had my medical – I've —

THE COURT: know you have the cluster headache problem.

THE DEFENDANT: Yeah, I have cluster headaches, and I've used that stuff because it always prevented the next one. And most of the medicines that I've been on for that is like Ergotamine and caffeine and things that really shrink up your veins. They had to check my fingers and toes every two days to make sure I wasn't getting gangrene and stuff like that. The prednisone steroids and stuff I was on, it was just too hard on me. I had a doctor tell me I shouldn't even be alive all the prednisone I took for these headaches.

And I'm not going to lie to you. I'm not saying I wouldn't have had my addiction anyway, but I think in my own heart that it does weigh something in, you know, from my heart. I know that I – I don't think I would have been into it if I would have been able to get my shots.

I went to Mason City in 2003 and got a shot, and I went to Sioux Falls, South Dakota, in 2004 and got a shot, and they last for 12 to 18 months at a time. That's how long the nerve blocks – they last. They shoot it in my spinal cord for a nerve block. And I went back this last time, and they told me each time you go it's three or four thousand dollars, and I [17] couldn't afford it, and they told me that the woman that did it there at Sioux Falls wasn't there anymore and they wouldn't have helped me anyway because I never paid my bill, and I just couldn't afford it.

Like I said, I just – I can't believe it. This is just – I'm flabbergasted myself. That's I guess how the evilness of that drug comes over people. I mean, it's – my family, they're supposed to be here at three o'clock because that's what time we thought this was going to be. And I'm just ashamed. I can't – you know, I'm ashamed for my family because they gotta live in a town now that knows I was doing something like that in our community and my kids in school. I just can't believe I got wrapped up into it again, Judge.

THE COURT: Yeah. And I gave you a big break on that Rule 35(b) motion. You know, I think I cut your sentence from 240 months down to 80 months as I recall.

THE DEFENDANT: I know. You did. You did.

THE COURT: But you're an addict so . . .

THE DEFENDANT: I know it, and having the headaches compound it. Just – it's just too much for me to handle I guess, and all the people that are still doing that stuff around my area, I lost my business because everybody that I hired from job service was doing the drug that they showed up to work for me, and I fought that. I mean, for three years they were doing it around me. I didn't do it. It didn't matter to me that they [18] were doing it, but it didn't hurt me because I didn't do it.

But, you know, I don't know how I'm ever even going to make this up to society let alone my family because I care about them so much. And they know that I was a person that they wanted – when I got out of prison, federal prison, in 2002, I came home, and I was the person that they wanted at home. I wasn't doing the drugs. I wasn't doing none of that.

And I just – I don't know how it happens. Just one day I'm starting doing the shit again. I don't understand it. I just – no matter what, I mean, she waited for me for seven years, and I got out, and she was still there, the kids and her. They waited for me. I opened up Christmas presents for six years that I was gone. I can't believe I'd do this to them.

I don't know how it happened except that I wanted – I knew it took away my thing for headaches. You know, I've always been real healthy. I've got all my teeth, and I've done the stuff since I was 14. My dad used to beat me and my mom. He'd hit us in the back of the head and stuff because it wouldn't show when I was 14 years old, and I think that's why it crushed the occipital nerves that they do the nerve block on now. And it helps me with my headaches. And my mom had

the same headaches, and she was in mental institutions her whole life, in and out, because she had these headaches the same as I got them, and I think it was from my dad beating us.

One morning I went to school on the bus, and he beat [19] me black and blue, so I ran from the bus stop to social services, and I turned him in, and they put me in a foster home. They took pictures of my body, and he was – you know, both my parents died while I was in federal prison, and I don't hold that against him for some reason. I don't know. My dad loved me. My stepdad loved me. I know he did, and I know I caused a lot of problems, but I don't think I deserve to be beat that bad. I'm just so sorry. That's all that I have.

THE COURT: Okay. Thank you, Mr. Putensen. I hope you understand that my hands are relatively tied. I can't just give you the sentence I'd like to give you. I have to follow the law and the procedures, and I intend to do that. But I'm very sorry about the fact that your parents passed away while you were in federal prison. And I'm sorry you're back in front of me again. I know you didn't want to be.

And I understand that it's driven by your addiction. I do understand that. And I just wish Congress understood it a little better so that we wouldn't take these addiction problems and criminalize them like we have with these heavy-duty mandatory minimums. But I have to follow the law whether I like it or not.

Mr. Stoler, anything else you'd like to add?

MR. STOLER: No, Your Honor.

THE COURT: Mr. Fletcher, anything else you'd like to add? [20]

MR. FLETCHER: No, Your Honor. Thank you.

THE COURT: Okay. In this case I find the total offense level is 34, criminal history category 3, but there's a mandatory minimum life sentence due to the 2 prior drug convictions. And the U.S. Attorney's Office has made both substantial assistance motions which allow me to go below the mandatory minimum of a life sentence.

I find that the cooperation was relatively timely but certainly not, you know, at the top of the list in terms of timeliness.

I find it was truthful, complete, and reliable. Those are very important. I find that it was important in indicting three individuals and in corroborating other information.

I also find that your substantial assistance was not only complete and reliable but very detailed. You talked about the time frame, the quantity of pills, the location of the particular cabin used by Mr. Roth and that all of this information was valuable and of great assistance to the government in indicting the three individuals. That would be Johnson, Roth, and Wilson, although I understand the government also had other evidence that they could have used, and I'm not finding that your evidence was solely responsible for the indictment, but it was obviously of great value to the United States.

I understand that you not only debriefed but you also [21] testified in front of the grand jury.

With regard to your ready, willing, but not able to cooperate, I don't think I can give that any weight under the 5K1.1 factors, and I'm not. It seems to me the fact of the matter is while you might have been ready and willing, you weren't able to, and the reason you weren't able to was all of your own making. You know, you violated your supervised release, and the U.S. Attorney's Office was well within its discretion to say they're not going to release you.

Mr. Stoler, those are kind of my findings in terms of the 5K1.1 factors. I don't have any reason to disagree with the government's evaluation of the significance and usefulness of the defendant's usefulness. Matter of fact, I've adopted really exactly what Mr. Fletcher told me. I have some disagreement with their recommendation of 10 percent, but I don't believe I asked you directly what your view would be as to the appropriate percentage reduction.

MR. STOLER: Your Honor, we recently had this same type of discussion on a similar-type case as far as the amount of cooperation. And again, there's the hook out there that there's a chance for a Rule 35 and hopefully obviously for Mr. Putensen's sake that that occurs.

I still subscribe to the belief that when one does what one – what Mr. Putensen has done in this case that a threshold of a 50 percent departure is appropriate and should be [22] considered.

I know the last case that I had with you we had similar circumstances, and I think the Court imposed a sentence that was a reduction of a 33 percent reduction. I hate to use percentages as such, but I think it's the only measure that we really have to use.

And I would urge the Court to consider somewhere in the range between the 33 percent and the 50 percent reduction, Your Honor.

THE COURT: Mr. Fletcher, anything else you'd like to add?

MR. FLETCHER: No, Your Honor.

THE COURT: Here's kind of my dilemma. Post Gall versus United States, I still think the circuit has this requirement that in order to do a 50 percent reduction it has to be extraordinary. Now, whether in light of Gall which is really on a different issue – and that would be application of the Title 18, 3553(a) factors – they would still require extraordinary substantial assistance in order to justify a 50 percent reduction, I think it's very much an open question. But I have to follow the law as it is, not what I hope it will become.

And so what I am willing to say is that if there was no extraordinary requirement I would easily do a 50 percent reduction in this case. But because I consider myself – well, I am bound by Eighth Circuit precedent, so until the law [23] changes – and maybe this case would be the appeal that might change the law – I consider myself bound by this extraordinary requirement, and I don't find that Mr. Putensen's substantial assistance in this case, while significant, while very significant, I don't find that it meets the extraordinary requirement.

So based on my evaluation of the 5K1.1 factors, particularly regarding the truthfulness, completeness, reliability – and I would add I think contained within that the specificity that Mr. Putensen provided here with regard to the time frame, the quantity of pills, the

location, this unusual cabin location, the fact that U.S. Attorney's Office was able to corroborate other information through Mr. Putensen's testimony and we therefore know it's completely truthful and reliable, his relatively positive timeliness in terms of his cooperation although not as timely as others and the nature and extent of the defendant's assistance, taking into consideration all of those factors and the evaluation of the significance and usefulness, I'm going to reduce your sentence by 35 percent.

I'm going to go off the 406-month figure for the reasons I've already indicated on the record. And so I'm going to reduce your sentence from 406 months down to 264 months.

Again, let me reiterate that if I wasn't bound by the extraordinary requirement to go to 50 percent I would try and align myself with my understanding of most of our sister [24] districts where what Mr. Putensen did would be enough to warrant a 50 percent reduction.

So it's my judgment that you're hereby committed to the custody of the Bureau of Prisons to be imprisoned for a total of 264 months.

You know, I'm not going to make any findings under 3553(a) because I don't think they apply in this case. Maybe that's error. Maybe it isn't. But my understanding is when there's a mandatory minimum you can't look at the 3553(a) factors. So I'm unwilling to say that this sentence is sufficient but not greater than necessary. In my view it's higher, so it is greater than necessary, but because of existing Eighth Circuit law, I'm not able to apply the 3553(a) factors, so I'm not going to create a sham and state that I've applied

them. I haven't applied them. If I had applied them, I'd wind up with a sentence that would be lower than the sentence I've given.

I'm going to recommend the 500-hour drug treatment program.

Is there a facility you'd like me to designate?

THE DEFENDANT: Somewhere where they got a hospital I guess to give me my nerve blocks.

THE COURT: Yeah. Why don't I recommend Rochester, Minnesota, because that's the closest medical facility —

THE DEFENDANT: Yeah, that'd be fine. [25]

THE COURT: – to your residence. Upon release from imprisonment, you'll be placed on supervised release for ten years. While you're on supervised release, you can't use or possess any illegal drugs. You can't possess any firearm, ammunition, or other destructive device or dangerous weapon. You'll cooperate in the collection of a DNA sample. You already know this, but you'll never be allowed to possess a firearm or ammunition unless you obtain restoration of your rights by filing a petition with the Bureau of Alcohol, Tobacco, and Firearms.

While you're on supervised release, you'll participate in a program of testing and treatment for substance abuse, and you'll be subject to the standard search condition.

You don't have the ability to pay a fine, so the fine is waived. There's a hundred-dollar special assessment. You're remanded to the custody of the United States marshal to serve this sentence.

You have a right to appeal the sentence that I've imposed. If you decide to appeal, you need to file a written notice of appeal with the clerk of our court within ten days of the date the judgment entry is signed and filed by me. If you're unable to pay for a lawyer or pay the costs of an appeal, those costs will be paid on your behalf.

We need to talk about the revocation of supervised release, but before we get to that, I want to talk to you about [26] this Rule 35(b) motion. You're obviously familiar with it because you and I have been through that before, and there's been some indication by Mr. Fletcher that your assistance may be useful to the government on some of these cases.

And as you know, it's totally up to the U.S. Attorney's Office as to whether they file a Rule 35(b) motion. Mr. Stoler doesn't have the authority to file it on your behalf. I don't have the power, authority to initiate it on your behalf. Only the U.S. Attorney's Office does. But if they do, then I'd have another opportunity to review any additional substantial assistance and then reduce your sentence accordingly.

The number-one thing I look for is to see if you're truthful. As long as you're truthful, I would use these same factors that I discussed. And while there are no guarantees or promises, I certainly know of no reason why I wouldn't give you a further reduction if I had the opportunity to do so based on the, you know, nature and extent of your substantial assistance.

THE DEFENDANT: Thank you, Your Honor.

THE COURT: So, you know, there's always hope for that because I realize that the sentence that I've

imposed, even though it's a 35 percent reduction, is a very, very lengthy sentence indeed.

Let's take up the supervised release. I don't know – I'm not even sure what the time frames are, so you probably have some procedural ground you could raise if you want to and we [27] could come back and do it another time. But I suspect we might as well resolve it now, but I don't want to put any pressure on you to do that.

MR. STOLER: Your Honor, I had a moment to discuss with Mr. Putensen as far as the –

THE COURT: Absolutely.

MR. STOLER: No, I have had.

THE COURT: Oh, you have had. Okay. Great.

MR. STOLER: It's his intention to waive any notice requirements, and he intends to admit to the petition for offender under supervision.

THE COURT: Okay. Then I'm going to find that you're in violation of the two mandatory conditions contained in the petition.

Mr. Fletcher, do you have a recommendation?

MR. FLETCHER: We'd ask that you follow probation's recommendation in this case of that range, and it's up to the Court whether you run it concurrent or consecutive.

THE COURT: Do you have a view on that?

MR. FLETCHER: I don't know what probation recommended to you, but whatever they recommended, whatever you want, that's your discretion, Your Honor.

THE COURT: Okay. Mr. Stoler?

MR. STOLER: Your Honor, I would ask you to consider based upon the sentence you've imposed to run it concurrent to [28] the sentence that has been just imposed on the case, the reason being is that there is the issue that he was in state custody from back in July of '07 until he came into federal custody 5 months – 5 months there that isn't going to be accounted for, I'm sure he's not going to get credit for.

So from that standpoint there is a little bit of time he should be entitled to. And the nature of what his violation was I think is evident from what he's pled to in the indictment that was filed against him, and I think that it runs as part of that, and a sentence of 46 months that's concurrent to the sentence just imposed I think would be an appropriate sentence for Mr. Putensen.

THE COURT: Mr. Moore, do you want to put on the record what your recommendation to me was?

MR. MOORE: In chambers we had discussed time served sentence concurrent to this sentence. I believe if we – if you followed my recommendation of a time served sentence then we would end up having a variance issue due to the guideline range, but I believe the 46 months concurrent would essentially have the same effect as a time served sentence concurrent.

THE COURT: Well, I agree with the last part of your statement. I don't really agree with the former. It wouldn't really be a variance. It's not a guideline. It's a policy statement, and I'm not bound by it. And, therefore, it doesn't arise to the effect of an advisory guideline. And, therefore, [29] I'm free to do a variance.

But I think you have an excellent suggestion. The 46 months concurrent accomplishes the same thing as

time served, and then we avoid whatever it would be. You called it a variance. I think it would be a disagreement with the policy statement. So I'm going to go ahead and impose a 46-month sentence, run it concurrently with the sentence that I've just given you. And I don't think I have to make any other findings.

THE DEFENDANT: Thank you, Your Honor, for that.

THE COURT: Pardon me?

THE DEFENDANT: Thank you.

THE COURT: Yep. You're welcome. I think – can I just end his supervised release on what I just revoked it on?

MR. MOORE: (Nodded head.)

THE COURT: Yeah, there will be no additional term of supervised release because you have the ten years of supervised release on the underlying charge that I sentenced you on.

Mr. Putensen, I just wanted to say this to you, that, you know, my heart really goes out to you. When I – it just made me sick when I read the presentence report. And I know how remorseful you are. And I think you're very sincere. And you are – like so many people I see, you're a meth addict. You didn't have – I guess you had control the first time you used it, but once you became an addict, it's kind of almost out of your hands for most people because it's such a powerfully [30] addicting drug. And I just regret the fact that I had to impose this sentence.

But, you know, it's a nation of laws, and I have to follow the laws whether I agree with them or not, and I try and do that to the best of my ability.

But I just wanted you to know personally I have a lot of empathy for you and the situation you're in. You've always been very, very candid with me and very honest, and I appreciate that. And I'm just – I regret very much having to give you the sentence that I imposed.

So good luck to you.

And I'd ask our U.S. marshals to see if they could accommodate a family visit.

THE DEFENDANT: Thank you.

THE COURT: Okay. Good luck, Mr. Putensen.

And also – I wanted to give the U.S. Attorney's Office an opportunity to object to the extent of my substantial assistance departure if you'd like to do so.

MR. FLETCHER: Thank you for the opportunity, but I have nothing to say, Your Honor. Thank you.

THE COURT: Okay. Thank you. We'll be in recess.

(The foregoing sentencing was concluded at 2:54 p.m.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA,	No. CR14-4017
Plaintiff,	TRANSCRIPT OF SENTENCING
vs.	
JOSE MANUEL GARDEA,	
Defendant.	

The Sentencing held before the Honorable Mark W. Bennett, Judge of the United States District Court for the Northern District of Iowa, at the Federal Courthouse, 320 Sixth Street, Sioux City, Iowa, July 17, 2014, commencing at 10:28 a.m.

APPEARANCES

For the Plaintiff:	JAMIE D. BOWERS, ESQ. Assistant United States Attorney Ho-Chunk Centre - Suite 670 600 Fourth Street Sioux City, IA 51101
For the Defendant:	MICHAEL SMART, ESQ. Assistant Federal Defender Suite 400 700 Pierce Street Sioux City, IA 51101
Also present:	Jill Freese, U.S. Probation
Reported by:	Shelly Semmler, RMR, CRR 320 Sixth Street Sioux City, IA 51101 (712) 233-3846

[2]

THE COURT: Thank you. Please be seated. Good morning.

THE CLERK: This is Case Number 14CR4017-1, United States of America versus Jose Manuel Gardea. Counsel, please state your appearance.

MR. BOWERS: Jamie Bowers here for the government. Good morning, Your Honor.

THE COURT: Good morning.

MR. SMART: Michael Smart appearing for the defense. Good morning.

THE COURT: Good morning, Mr. Smart. Have you had a full, fair, and complete opportunity to review the presentence report with your client?

MR. SMART: I have.

THE COURT: And do you agree the total offense level is 23, criminal history category 4, advisory guideline range of 70 to 87 months; however, there's a mandatory minimum 120-month sentence, and the statutory maximum is life?

MR. SMART: I would agree with that.

THE COURT: And does the government agree with those calculations?

MR. BOWERS: Yes, Your Honor.

THE COURT: And is the United States making a substantial assistance motion?

MR. BOWERS: We are, Your Honor. We're making both [3] motions and recommending 20 percent off the 120-month minimum.

THE COURT: Okay. And would you like to go through the substantial assistance factors?

MR. BOWERS: Yes, Your Honor. Looking around the courtroom, it looks like everybody here is friendly to the defendant, and so I will be a little freer to talk about what he did.

The defendant has testified in the grand jury for me on a case yet to be indicted. I expect it will be soon. We're waiting on a lab report, and that's pretty much what's left. But I brought him in early because I wasn't sure once the case got charged whether there would be any other work for him to do. It's a pretty strong case, but he helped.

The big deal is Mr. Gardea is a – or was at least a gang member, and he's got gang markings tattooed on his body, and they're big ones, and they are going to be hard to get off, and he – his life will be lived with that and has been. He testified against a person that is gang affiliated, and that isn't a big deal right now, but once it's disclosed that he did that, that will be a big deal for him, I expect.

In the age of social media, news travels fast, and Mr. Smart and I were talking about this before – just before the hearing here. We have reports that even in the prison system presentence investigation reports, pretrial memos from both sides find their way into the hands of folks, and I cant [4] stop it, but it's a concern I have.

That being said, Mr. Gardea gave a really thorough debriefing. I talked to him about four hours I think in a jail one day with Mr. Smart. And he's been candid I think and talked about some folks that if I

were he I probably wouldn't want knowing that I talked.

And so we took what he said, and I was able only to make one case out of it. Frankly, the case is strong without him, but it's stronger with him. And I wanted to give him an opportunity to come in and talk about it, and he did.

I think he's a smart man. I don't know if he's book smart, but he appears to be a thoughtful person, and, frankly, I was surprised at the candidness that I got in the interview. So with that, I think it merits a 20 percent reduction.

THE COURT: Is there much likelihood of a Rule 35(b) motion?

MR. BOWERS: He talked about some other people who are active in the drug trade here. Most of what he told us was well known to us through other witnesses. It's a possibility. I would not – I would not be opposed to bringing him back if it was one of my cases. I just don't see it in the offing here.

THE COURT: Well, let's take, for example, the one person that you'll probably be able to indict.

MR. BOWERS: Yeah.

THE COURT: Let's say, for example, that person goes [5] to trial.

MR. BOWERS: If she goes to trial, I'm going to bring him back.

THE COURT: Yeah. And then there probably would be a Rule 35(b) motion.

MR. BOWERS: Exactly right.

THE COURT: Okay. But person pleads, probably not.

MR. BOWERS: It's a strong case.

THE COURT: Yeah.

MR. BOWERS: Yeah.

THE COURT: You already have a strong case without him.

MR. BOWERS: I do.

THE COURT: Stronger with him I think was your phrase. Strong without him; stronger with him.

MR. BOWERS: That's right.

THE COURT: Yeah. Mr. Smart?

MR. SMART: Thank you, Your Honor. I appreciate Mr. Bowers being very thorough. He and I have talked about this case quite a bit. I would just add with regards to some of the dangerousness that our clients who have had either gang affiliations or former gang affiliations or having – this is just anecdotal. I don't have statistics on it. But our office has noted an increase in our clients calling us back to see if there isn't something we can do for them because it seems that [6] in the advent of social media with people who are getting on to the – they're getting on to the court docket system, and they're seeing what our clients have done, and it has become more dangerous for them. And that is a problem.

I would – I don't really have a great deal to add because I think Mr. Bowers was very thorough in addressing the assistance-related factors to the Court.

This Court has cited before that the average assistance-related departure is about 47 percent

across the nation. I would say that my client was certainly truthful and very complete. I sat in on those proffers, and he was very detailed.

You know, based on that, I would ask the Court to go a little bit closer to the average. I'm not suggesting maybe 47 percent, but at least 40 percent I think would be reasonable in this case. He did testify in front of grand jury, although I understand he was a – what would be termed as a minor witness. However, when he goes away to prison, he is certainly going to be facing – almost certainly going to be facing some real risk because of his gang affiliations. The person he testified against also has very strong gang affiliations. Once discovery becomes available in that case, unfortunately my client's going to be discovered, and word's going to get out to other gang members what he did, and he's going to have to live with that.

So I can't say that the threat has been made to him [7] now, but I would anticipate that he's going to have to live with that in prison, and it's a difficult thing to do.

So I would respectfully request the Court to consider 40 percent.

THE COURT: Well, Mr. Smart, he's done substantially less than the average cooperator. I mean, it hasn't even been placed in anyone's discovery file. No one's even been indicted yet. So to say it's closer to the national average, I don't see that. He testified in front of the grand jury, and somebody may be indicted, and they could have been indicted without it. So I don't consider that to be an average cooperator. An average cooperator would be probably somebody who's either testifying in the grand jury or an agent testified about

what they knew. It was placed in the person's discovery file, and there's a link between that and the person pleading guilty. Maybe – you know, maybe an average is even a little more than that.

But to say that this approximated an average cooperator, this approximates about the minimum somebody could do. What could somebody do that would be less than this and still get a substantial assistance motion? I guess they could debrief, but, you know, the difference between debriefing and testifying in front of a grand jury where it's a secret proceeding, you're not being cross-examined, you know, I don't think that's a huge difference.

MR. SMART: Except that the government has either — [8] and I'll have to ask Mr. Bowers if he's already indicted that individual or —

THE COURT: He said he hadn't.

MR. SMART: But I believe Mr. Bowers intends to indict the individual, so his discovery will be placed in that individual's file. And as far as the average cooperator, it's pretty typical in our discovery files that we review a single case might have three or four cooperators. And some of those cooperators will have testified in front of a grand jury. Some of them might not have. You know, I assume when I see average, I assume the person that is above average is somebody that's made a controlled buy or somebody that's gone to court to testify.

But the people that have made controlled buys and the people that have gone to court to testify at least in my experience – I don't have statistics to give the Court. I can only testify or tell you from my experience. People that have actually made those controlled buys

or testified, I would say they're in the minority that are —

THE COURT: I would agree with that.

MR. SMART: So if I'm going to go with average, closer to the average has to be the people that are giving information, maybe testified in front of grand jury. But typically where you have three or four cooperators, their testimony becomes cumulative. It's certainly better for the government if they [9] have three or four or five cooperators testify at trial.

THE COURT: One of the reasons why national averages aren't all that helpful is so many – you know this because you know how Nebraska works. And there they do what? Rule 35(b) motions. And so I think that's all thrown in in this national average. I don't think they separate out substantial assistance from 5K motions to Rule 35(b) motions. So, you know, some districts do only Rule 35(b) motions. So that kind of skews it too so it's –

MR. SMART: And that's true, Judge. And I've actually – I've searched for better studies. There's a 1998 study, but I think that's kind of dated. So I haven't found one that breaks it down further for us to get a better idea. So that leaves me to just kind of go with my own experience or the experience of my office. And, you know, at least based on my experience what I see in discovery files, I wouldn't place him – I think he's closer to the average. I don't think he's quite to that median.

THE COURT: Well, how about going back to the original question I posed? And that is what would be the least that somebody could do and still get a substantial assistance motion?

MR. SMART: I think the least somebody could do and still get a substantial, just talk about a couple of people, never go to grand jury, maybe talk about a couple of people, give the government leads where they eventually develop cases [10] and – but the witness isn't valuable enough to pull into a trial.

THE COURT: Well, this is pretty close to that, isn't it?

MR. SMART: Well, he did testify in front of grand jury.

THE COURT: And why is that that significant rather than just providing a debriefing?

MR. SMART: If he testified in front of grand jury, even though they said they already had a strong case against the person, if he testified in front of grand jury, I have to assume that that person's a good-enough witness to use at trial. And so he's ready, willing, and able to go to trial. Whether he gets that opportunity or not, I don't know. But as the Court knows, at trial you want more than one cooperator to come in because their credibility is always suspect. So, you know, based on that, I would place him a little bit closer to the average.

THE COURT: Anything else?

MR. SMART: No.

THE COURT: Okay. Thank you, Mr. Smart.

Mr. Bowers, anything else you want to add?

MR. BOWERS: If you don't mind, Your Honor, I'd kind of like to add to this. Actually I'm probably the guy who can tell you about what's the least and what's the most and all [11] that. As you know, you've been an active spectator on this issue for years and years.

And it's changed a bit depending on who's in charge and what the national marching orders are.

But the least in my mind is – as you've seen, I've recommended no motion on times – in times when people have debriefed and given us a proffer interview. In those situations it's usually somebody who regurgitates what they think we already know or, frankly, tells us the truth but we already know it and there's nothing – there are no fish in the boat as we say, there's nothing new to be gained.

The very least where we make a motion currently is where someone debriefs but tells us information that we don't know and then we can corroborate after the fact. So it's useful information that we can add to the pile and add to our intel.

Currently we are as a rule or as a trend anyway making motions for people, minimal, but we are.

It is true I think in this case that we are one notch above that, that Mr. Gardea based on my assessment of this was asked to come in and give what I believe is truthful testimony in front of the grand jury. Is he the main witness in this case? No. Is he a corroborative witness that's useful? He must be because I asked him to come there, and so it's self-evident. But he did something beyond the lowest rung if that's the question.

The big question is what's it worth. I think our 20 [12] percent recommendation is reasonable, and stacking up against the other folks, it makes sense. But he probably wasn't the minimal participant. He wasn't the bottom of the rung on folks that get motions. He did something extra.

The big deal, however, is I would treat him like someone who testified against a family member. Being a gang member, an OG as we call him, an original gangster in this local set, he is thought of as – or at least was thought of as family. And that can often be a big deal when someone testifies against another gang member. I think he's removed himself quite a bit from that milieu, but there's still that. And when he goes to prison, he will have to line up north versus south. That's just how it works. And so there is that added thing.

THE COURT: Is the gang just a local gang?

MR. BOWERS: No, no. It's —

THE COURT: Florencia; right?

MR. BOWERS: Florencia 13. It's – Mr. Gardea can tell you. I don't expect him to, and I don't actually want him to here.

THE COURT: Right.

MR. BOWERS: But there are different sets. The one we have here is much disorganized. But nationwide historically it's a pretty pervasive and powerful gang.

THE COURT: Doesn't it have ties to Guatemala?

MR. BOWERS: I don't know that, but I know it [13] originates out of California and —

THE COURT: Yeah. Mr. Smart, anything else you'd like to add?

MR. SMART: No, nothing further.

THE COURT: Do you have any more insight on the gang affiliation because that seems to be maybe one of your stronger points?

MR. SMART: You know, with regards to the gang affiliation, I can just tell the Court the experience of our office, and I personally have had this experience with former clients calling me back asking me if I can somehow alter their PSIRs and send it to them because otherwise they're going to have to spend all of their time in the hole.

I just recently had a client in the Southern District who was sent to Florence, Colorado. The first day he walked on the yard he was viciously attacked by some other inmates who had people on the outside find out what happened, and so they attacked him, and then he immediately put himself in a hole. His family contacted me and told me he's being sent to a different facility now.

So it is a real problem but particularly where you have gang affiliations because they've got a network. And so I am concerned about that with this client.

Just for the —

THE COURT: I wonder if there's an app for that, [14] altering your PSR.

MR. BOWERS: There should be.

THE COURT: I'm sure there probably is.

MR. SMART: There probably is.

THE COURT: I think there are actually people who generate new PSRs for individuals.

MR. SMART: Yeah, my guess is they do licenses and all kinds of IDs so somebody can master that.

THE COURT: Yeah.

MR. SMART: You know, the Court asked about Guatemala, and I am – I've studied Guatemala a little

bit because I have a lot of clients from there. And unfortunately Florencia 13 is in Honduras and Guatemala. There's a Los Angeles connection.

THE COURT: Yes.

MR. SMART: But originally what had happened was is they had people indicted – or inducted in the gang in Los Angeles who were later deported, went down to those countries and then started up local chapters.

THE COURT: Yes, right. I've read about that. I think I've even seen a documentary about it, yeah.

MR. SMART: Yeah. And unfortunately I've had clients who have told me about that. So that's not anything to do with this case, but I just thought I would share that with the Court.

THE COURT: Okay. Thank you.

Mr. Gardea, you have the right to say anything to me [15] you want to. As you know, you have the right to remain silent.

And you don't have to say anything. And if you decide not to say anything, I will not hold it against you in any way. But if you'd like to say something, I'd be happy to hear what you have to say. Is there anything you would like to say?

MR. SMART: May I confer with him?

THE COURT: Sure.

THE DEFENDANT: No thank you, Your Honor.

THE COURT: Okay. Thank you.

Anything else either lawyer would like to add?

MR. BOWERS: No, Your Honor.

MR. SMART: No, Your Honor.

THE COURT: Okay. In this case I find the total offense level is 23, criminal history category 4. The advisory guideline range of 70 to 87 months is trumped by the mandatory minimum. So the mandatory minimum is 120 months. The statutory maximum is life.

I'm going to start at the mandatory minimum of 120 months. I'm granting the government's substantial assistance motion. Looking at the substantial assistance factors, I find that the defendant was timely.

In terms of the nature and extent of the defendant's assistance, it was certainly substantial. Mr. Bowers felt it important enough to take the defendant to the grand jury. Both lawyers indicate to me that the defendant was truthful, [16] complete, and reliable.

I have to evaluate the significance and usefulness of the defendant's assistance taking into consideration the government's evaluation. I agree with Mr. Bowers in terms of the significance of it. They had a strong case – they have a strong case against an individual who apparently will be indicted, but they have a stronger case with this information. So it's significant.

The factor that I'm going to focus on is danger or risk of injury to the defendant or his family resulting from his assistance. I think when a gang – former gang member provides information against a current or former gang member there's an increased likelihood of potential risk and injury. And I can pretty much take judicial notice of gang activity in Bureau of Prisons. Everybody knows it's there, particularly the – in the

higher-security facilities. And because of his prior record and criminal history, I doubt if the defendant would go to a prison camp. So he's more likely to encounter potential problems with gang affiliation.

So taking all that into consideration including the data on national averages which I give some weight to but not a whole lot of weight, I'm going to reduce Mr. Gardea's sentence by 30 percent from 120 months down to 84 months.

There's a possibility that you could be back in front of me on a Rule 35(b) motion, particularly if the person goes to [17] trial who's indicted or perhaps disputes the quantity and you're involved in either a sentencing hearing or trial. Of course, you have no control over whether that's going to happen. But if that happens, then there's a likelihood that I could further reduce your sentence. But who knows if that's going to happen?

So it's my judgment that you are hereby committed to the custody of the Bureau of Prisons to be imprisoned for 84 months.

Is there a facility you'd like me to recommend?

MR. SMART: Your Honor —

THE COURT: Yeah, it's not like a classroom where I call on people. Doesn't work that way. I appreciate it.

MR. SMART: Your Honor, as close to Iowa as consistent with his security classification.

THE COURT: Yeah, I'll make that recommendation, as close to Iowa consistent with the defendant's security classification.

I'm also going to recommend the 500-hour residential drug treatment program where you can earn up to a year off your sentence, although the average inmate earned about eight months off their sentence.

Upon release from imprisonment, you'll be placed on supervised release for eight years. While you're on supervision, you'll have the standard conditions set out in the judgment order. Additionally you can't violate any state, [18] local, or federal law. You can't possess or use any illegal drugs.

And while on supervised release, you'll have the following special conditions. You'll participate and successfully complete any testing and treatment for substance abuse. You're prohibited from using alcohol, going to bars, taverns, and other establishments whose primary source of income is derived from the sale of alcohol. You'll participate in any mental health evaluation and treatment and take all medications prescribed by a duly licensed physician.

You'll seek regular employment and participate in any employment workshops and report to the U.S. Probation Office to provide verification of daily job search. If you're unable to obtain full-time employment, you may be required by the United States Probation Office to do 20 hours per week of community service, up to 20 hours per week.

You'll be subject to the standard search condition which means United States probation officers can search your person, residence, place of employment, cellphone, computers, tablets, electronic storage devices, et cetera.

You don't have the ability to pay a fine, so the fine is waived. There's a hundred-dollar special assessment which can be paid pursuant to the inmate financial responsibility program. You're remanded to the custody of the United States marshal. [19]

I want to give you a heads-up. Should you be convicted in state court or federal court on another drug offense, you could potentially get a mandatory life sentence.

There's an appeal waiver in this case which means you've given up your right to appeal. So unless the sentence that I imposed was illegal, unconstitutional, or in violation of your plea agreement, you have no right to appeal. In those very limited situations, if you decided to appeal, you would need to file a written notice of appeal no later than 14 days from the date your judgment is filed. If you can't afford to pay for a lawyer, pay for the costs of an appeal, those costs will be paid on your behalf.

I'd ask the U.S. marshals to accommodate a family visitation.

And, Mr. Smart, anything further?

MR. SMART: No, Your Honor.

THE COURT: Okay. Thank you for your representation.

And, Mr. Bowers, anything further?

MR. BOWERS: No, Your Honor.

THE COURT: Okay. Thank you for your representation.

Good luck to you, and we'll be in recess.

UNIDENTIFIED FEMALE: Your Honor?

THE COURT: Yes.

UNIDENTIFIED FEMALE: Would it be okay if his mom gave him a hug? [20]

THE COURT: No. I'm sorry. That's against U.S. marshal policy.

UNIDENTIFIED FEMALE: Okay.

THE COURT: I appreciate you asking.

(The foregoing sentencing was concluded at 10:54 a.m.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA,	No. CR14-4016
Plaintiff,	TRANSCRIPT OF SENTENCING
vs.	
ESEQUIEL GUTIERREZ,	
Defendant.	

/

The Sentencing held before the Honorable Mark W. Bennett, Judge of the United States District Court for the Northern District of Iowa, at the Federal Courthouse, 320 Sixth Street, Sioux City, Iowa, July 31, 2014, commencing at 9 a.m.

APPEARANCES

For the Plaintiff:	JAMIE D. BOWERS, ESQ. Assistant United States Attorney Ho-Chunk Centre - Suite 670 600 Fourth Street Sioux City, IA 51101
For the Defendant:	PAMELA A. WINGERT, ESQ. Assistant Federal Defender 1212 18th Street Spirit Lake, IA 51360
Also present:	Stacy Sturdevant, U.S. Probation
Reported by:	Shelly Semmler, RMR, CRR 320 Sixth Street Sioux City, IA 51101

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[2]

THE COURT: Thank you. Good morning. Please be seated.

THE CLERK: This is Case Number 14CR4016-1, United States of America versus Esequiel Gutierrez. Counsel, please state your appearance.

MR. BOWERS: Jamie Bowers here for the government. Good morning, Your Honor.

THE COURT: Good morning.

MS. WINGERT: Pamela Wingert for the defendant.

THE COURT: Good morning, Miss Wingert. Miss Wingert, have you had a full, fair, and complete opportunity to review the presentence report with your client?

MS. WINGERT: I have, Your Honor.

THE COURT: And do you agree that the total offense level is 31, criminal history category 6, advisory United States Sentencing Guideline range of 188 to 235 months; however, there's a mandatory minimum of 20 years, so the advisory guideline range becomes the mandatory minimum of 240, and the statutory maximum is life?

MS. WINGERT: I agree, Your Honor.

THE COURT: And does the government agree with those calculations?

MR. BOWERS: Yes, Your Honor, we do.

THE COURT: And does the government have any objections to Defendant's Exhibits A and B? [3]

MR. BOWERS: Do not, Your Honor.

THE COURT: Okay. They're received.

* * * *

(Defendant Exhibits A and B were admitted.)

* * * *

THE COURT: I wanted to give the parties notice that I'm considering a upward variance based on the information contained in the 1B1.8 debriefing including the quantity of drugs and the nature of the home invasions. So just wanted to give you notice of that. We can take that up. I haven't made up my mind yet, but I'm thinking that it might be appropriate to do an upward variance for those reasons.

And is the government going to be moving to seal a portion of the hearing?

MR. BOWERS: We are, Your Honor, for very good reasons. We would like to seal the portion where we talk about the motions.

THE COURT: Okay. And does the defense have any objection to that?

MS. WINGERT: No, Your Honor.

THE COURT: Okay. What I'm going to do is I'm going to – we'll take that up next. And I'm going to order the courtroom and the transcript sealed. And then when we're done with this matter under seal, then everybody else will be able to come back into the courtroom when I announce the sentence. But [4] right now everybody that's not associated with federal and state law enforcement is required to leave the courtroom. That would be everybody in the back part of the courtroom.

(Sealed proceedings are contained in a separate, sealed volume.)

THE COURT: Miss Wingert, were you present during the debriefings?

MS. WINGERT: Yes, Your Honor.

THE COURT: Okay. And do you dispute Mr. Bowers' characterizations about the number of home invasions?

MS. WINGERT: You know, I didn't have a particular number. I —

THE COURT: Well, neither did Mr. Bowers.

MS. WINGERT: Right.

THE COURT: But he just said there were many, many, many is what I took out of it.

MS. WINGERT: I think that would be an exaggeration. Many might —

THE COURT: I was paraphrasing. There were many?

MS. WINGERT: I think that might be a more appropriate characterization.

THE COURT: Well, how many in your judgment? What's your best judgment about the —

MS. WINGERT: My best guess would be maybe less than ten which is still a lot of home invasions. [5]

THE COURT: Yes. Okay.

Mr. Bowers, can you quantify it at all?

MR. BOWERS: I can't. I think that's probably fair.

THE COURT: Okay. Now, why shouldn't I consider that in addition to the drug quantity mentioned in 1B1.8? I mean, I'm allowed to consider

it. It would seem to me that this case calls out for a substantial upward variance based on the dangerousness of the defendant, the threat to the community, and his whole course of conduct conducting home invasions and ripping off other drug dealers. So – but, you know, the government didn't move for that. So I'm interested in what the government's view is.

MR. BOWERS: You certainly can consider it in the —

THE COURT: Should I?

MR. BOWERS: I think you should consider it. It's a – it's part of the presentence investigation report. Our proffer letter, contract, says that you can consider it. It's all fair game for sentencing. It's not fair game for us charging based on – it's basically a use immunity section of the proffer letter contract which our circuit and others have said that's what it is; it's a contract, and it means what it says.

It's a risk that sometimes defendants take. They come in, and they tell us the whole story, and the whole story helps us. But sometimes it hurts them. I didn't move for an upward [6] variance. Frankly, I thought 240 months was a lot of time. It's above the guideline range which is – sometimes happens. But in the spirit of where this thing was going, I viewed it that way.

THE COURT: Well, it's a lot of time. Boy, do I understand that. But it's not a lot of time for what he did. I mean, there are plenty of defendants who less quantity, no home invasions, no thuggery going on that get a 240-month sentence. So for what he did, it strikes me as actually low. But I have a policy kind of

question. If I do an upward variance on my own, does that undermine the government's ability to have people cooperate?

MR. BOWERS: I don't want to put you in that trick bag, Judge. I don't want to put you in that box. Maybe is my answer. I try to live – I try to walk as a prosecutor this way. I like to say, hey, look, we need your cooperation, we'd like to know something about X. If you – if you tell me the truth, if you're complete and you're accurate and you're all those things that qualify under the 5K, then we come in, and we make a motion. And I like to be able to have folks say he did what he said he was going to do.

This is separate and apart from that somewhat. But it's still in the realm. And I can see a defendant thinking, boy, that was a stupid mistake on my part. I should have shut up and gone home and let the chips fall. [7]

So the answer to your question probably is closer to yes, but maybe is the best I can do because it's situational. Every person's different here.

THE COURT: Let me ask – let me ask it a different way. If I were to vary upward but then depart downward more than the government recommended and wind up at or near the same place the government recommends, I don't believe that would undermine the government's position. Do you see what I'm saying?

MR. BOWERS: I do. And again, I must tell you this, that in our conversations with defendants, we – I don't want to say we. I want to say me because this is the only thing I know. It's always clear that it's up to the sentencing court always.

Now, I think that's right. I mean, I think technically how we do things based on how our law here has evolved on this issue, I think that's exactly correct. You could do that, and it would certainly be within – within your prerogative, and I think it would make sense to a defendant if that happened.

THE COURT: And it really wouldn't undermine your goal either because the defendant would wind up pretty much where the government recommended.

MR. BOWERS: I want a defendant to go to prison thinking I'm here because I did something bad and I could have been worse because I did something good to help the government, [8] not sitting in a cage thinking I got screwed because of the system and because of the guidelines and because the government reneged on their word. That's what I don't want to have happen.

THE COURT: Right. And I don't want that to happen either.

MR. BOWERS: Yeah.

THE COURT: We actually share that view.

MR. BOWERS: Sure.

THE COURT: And I know Miss Wingert doesn't want that to happen either.

MR. BOWERS: Right.

THE COURT: Anything else you'd like to add?

MR. BOWERS: No, Your Honor.

THE COURT: Miss Wingert, anything else you'd like to add?

MS. WINGERT: You know, Your Honor, I guess as far as the mandatory minimum, you know, it sets the guideline range, but otherwise we would have a

guideline range below that mandatory minimum. I'd like to see the Court come off that mandatory minimum and not do that variance upward.

THE COURT: Well, except that the guideline range doesn't reflect everything in paragraph 21 and 22. Matter of fact, it doesn't take any of that into consideration whatsoever.

MS. WINGERT: Right.

THE COURT: So it's another flaw in the guidelines. [9] Because they're general guidelines, they can't reflect the information in every specific case, and in here they don't. I mean, if he had done no home invasions and no strong-arm robberies, we'd be at the same range we are now.

MS. WINGERT: And we would be looking at the mandatory minimum of 240 months, and what he did there was information he gave them to try to help the government. I would hate to see us put in a position where because he gave more information then we would be looking at a sentence that would be higher than if he had kept his mouth shut. And that would be potentially an outcome here if we do an upward variance.

THE COURT: Well, not if I go below the 240 with the – with the motion going downward.

MS. WINGERT: Well, he's not getting the full benefit, though, then of his cooperation from where we start.

THE COURT: Well, yes, he is, but he's – but we start at a different point based on his actual conduct.

MS. WINGERT: And conduct, though, then that the government and the Court wouldn't know about unless he had attempted to cooperate.

THE COURT: But – but – okay. But let's say he didn't debrief at all. He'd be at 240; right?

MS. WINGERT: Right.

THE COURT: So as long as he gets sentenced below 240, he gets the benefit of cooperating. But he doesn't get as much [10] benefit as if he wasn't a serial armed strong-arm robber. And what's wrong with that? What's wrong with somebody who's a serial strong-arm robber getting more time than somebody who isn't? I mean, to me it's like how could you possibly look at it any other way?

MS. WINGERT: You know, one thing I guess that's different about that, Judge, when we start with the mandatory minimum at 240, I don't have the opportunity to try to present to the Court mitigating factors in a motion for a downward variance because the only reason that we would go down below what the guideline and the mandatories say would be because of his substantial assistance. So I couldn't try to help the Court with reasons why we might have wanted to lower that guideline range and we're left then with what the substantial assistance motion would come down off the 240.

THE COURT: Well, there is some truth to that but only to the extent that you didn't anticipate that a judge would want to go upward for somebody who is a serial strong-armed robber.

MS. WINGERT: Well, I guess –

THE COURT: So tell me what you think the mitigation – you want me to continue it to allow you to put on mitigation? I mean, to be honest with you, unless he was a Pope or something that he hasn't disclosed to the rest of us, I can't imagine any mitigation would overcome my view of him that he self-disclosed that he was a strong-arm r – repeat, [11] multiple-armed invasion person. It would take extraordinary mitigation to overcome that. You know, I've seen mitigation in thousands of cases. I've never seen mitigation that would overcome my view of a strong-arm home invader because we see so few of them.

MS. WINGERT: We do. But, Judge, I think if you looked at the presentence report, there was a period in his life when there was a break in how his life had been going. That early adolescent drug abuse started when he's about 16 years old, I think impulse control and those kind of things that developed after that —

THE COURT: I understand that. I wrote a lengthy opinion about it in United States versus Hendrickson. But I wasn't dealing with a strong-arm serial home invader. And no amount of sociology or psychology is going to convince me that a childhood caused somebody to be an armed serial home invader, and I wouldn't find it – I just can't imagine a case where I would find that mitigating. It's different than being an addict. You know, I mean, he was addicted to strong-arm home invasions of drug dealers to make money, but it wasn't a psychological addiction.

MS. WINGERT: But he did have a methamphetamine addiction that started at a young age.

THE COURT: Yeah, I understand that, but that doesn't excuse violence in my view. [12]

MS. WINGERT: I'm not saying it excuses it. I'm just asking for mitigation on those purposes.

THE COURT: You really – if I gave you a continuance, do you have any confidence that you could come up with any mitigation other than what you've argued now?

MS. WINGERT: I guess as far as what I would have, I think it appears in both the letters that we've submitted and also in the presentence report.

THE COURT: Right. There isn't anything else lurking there that —

MS. WINGERT: No.

THE COURT: – you know –

MS. WINGERT: No. I would certainly have argued about the methamphetamine guidelines. The Court has been willing to consider that in the past on a variance position also. So the addiction, methamphetamine guidelines —

THE COURT: Yeah, but that doesn't really help you because we're at a mandatory minimum.

MS. WINGERT: Well, and that's why, you know, I didn't file a motion.

THE COURT: I understand your position. I just disagree with it. And, you know, I think 99 percent of judges looking at somebody who is a serial recidivist armed home invader would want to take that into

account at sentencing. I mean, I can't imagine not. Can you imagine if you were a judge [13] not wanting to take that into account?

MS. WINGERT: I think you would take it into account, Judge, and I think that's understandable. But I would ask that you consider these other factors as well.

THE COURT: Okay. That's very reasonable. And I will consider them because to be quite candid with you, I'd have no qualms about varying up to a life sentence. I wouldn't lose a – and I sweat over these sentencings. I think you know that. I wouldn't lose a second of sleep giving Mr. Gutierrez a life sentence. And, you know, if you ask members – it's not a popularity contest. But if you ask members of the public and they knew what I knew, virtually a hundred percent of people would say he's deserving of a life sentence. I don't believe my view is idiosyncratic. Who varies downward more than me in the country? Name a single judge who goes downward more often than I do. You can't. Can you?

MS. WINGERT: No.

THE COURT: Okay. So it's not that I'm out to impose harsh punishment on people. I'm not. I was the second judge in the country to have a substantial disagreement with the meth guidelines. Well, actually the first with meth guidelines and the first to reduce them by 33 1/3 percent. So, you know, nobody can say that I'm a Maximum Mark out there trying to impose the maximum possible punishment. It's just the opposite. But when I see somebody who is a threat to society and a violent [14] threat to society, I intend to punish them accordingly.

Now, the fact that it was 1B1.8, you know, militates against using it fully. I understand that. The fact that I don't want to undermine the government's ability to get cooperators – I mean, if I were to just go ahead and vary up to a life sentence, that wouldn't promote the government's ability to have people cooperate because here it's [sic] very cooperation that would have caused me to go up to a life sentence, and I understand that. And while I'd be comfortable giving a life sentence, I'm not going to.

And I think he should be rewarded for substa – for the motion the government made, and I intend to do that. And I actually intend to reward him with a higher percentage than what the government recommends.

So if I was out to just impose harsh punishment, I wouldn't do that, would I? Would I?

MS. WINGERT: No, Your Honor.

THE COURT: Yeah. Okay. So, Mr. Gutierrez, you have the right to say anything to me that you want to. You don't have to say anything. You have a right to remain silent. If you exercise your right to remain silent, I will not hold it against you in any way. But if you'd like to say something, I'd be pleased to hear what you have to say. Is there anything you'd like to say?

THE DEFENDANT: Your Honor, I just want to apologize [15] to society and to your courts and to my family for just – I just want to apologize to the courts, to society for everything I've done. I know I – like I say, I been bad to society. You know what I mean? I just been a ghost to myself, you know, and I just hope you have a little mercy on me and give me the – whatever I deserve.

THE COURT: Well, I don't think you want whatever you deserve.

THE DEFENDANT: No, I know I don't, sir.

THE COURT: You want something lower than that; right?

THE DEFENDANT: Yes, I do, sir.

THE COURT: Okay. And I'm going to give you something lower than what you deserve.

THE DEFENDANT: Something my family would deserve.

THE COURT: Pardon me?

THE DEFENDANT: Something my family – something that won't hurt my family so much. That's who's paying the price right now, my daughter right now.

THE COURT: Sure.

THE DEFENDANT: You know, I got many kids and –

THE COURT: Got a lot of kids, but you weren't thinking about them when you're out doing strong-arm robberies.

THE DEFENDANT: No, I wasn't, sir. You know, all I ask is have mercy for my children and my family.

THE COURT: Thank you. That's a very fair request. [16]

THE DEFENDANT: You know what I mean? I know what I done, and I can't take it back, but I'm here to pay what I owe.

THE COURT: Anything else?

THE DEFENDANT: No, Your Honor.

THE COURT: Okay.

THE DEFENDANT: I just apologize.

THE COURT: Thank you. You're very well spoken, Mr. Gutierrez. Thank you.

Anything else either lawyer would like to add?

MR. BOWERS: No, Your Honor.

MS. WINGERT: No, Your Honor.

THE COURT: Okay. In this case I find the total offense level is 31, criminal history category 6, mandatory minimum 240-month sentence, maximum sentence life, advisory guideline range of 188 to 235 months.

The advisory guideline range does not take into account the quantity of drugs the defendant admitted to in his 1B1.8 statement, and the guidelines do not take into account the dangerousness, recidivism, serial repeat strong-armed robberies and other robberies ripping off drug dealers of drugs and money.

And so I'm going to vary from the mandatory minimum of 240 months based on the reasons that I've discussed taking into consideration the mitigation that defense has argued because otherwise potentially I would go quite a bit higher. But I'm going to go up to 300 months based on the upward variance. [17]

But I'm granting the motions – the government's motion, and so I'm now going to depart downward based on the 5K1.1 factors. I find that the defendant was very timely. The nature and extent of the defendant's assistance here is quite substantial providing important information against one

individual who's already pled guilty and significant information against other individuals but they – that hasn't risen yet to the level of substantial assistance because the government hasn't been able to act on that information.

I believe Mr. Gutierrez was truthful, complete, and reliable. And I agree with the government's evaluation of the significance and usefulness of it. There really isn't – is there any evidence or any argument even to suggest injury or danger or risk of injury to the defendant or his family? I mean, he seemed to be in a milieu of very dangerous activity, so that probably in and of itself suggests there's more of a possibility of dangerousness than there would be in the typical case simply because the defendant was more dangerous than other defendants. I'm really not sure about the logic of rewarding him for being dangerous; therefore, the likelihood of greater danger to him. That seems to be a little bit odd, but what's the government's position on this prong?

MR. BOWERS: He's not a delicate flower. I don't think based on what we've heard here today that that's – he's been put at risk, but there is the stigma that even this hearing [18] alone might place on him, so there's that.

THE COURT: Miss Wingert, anything else you'd like to add on that?

MS. WINGERT: I don't have any specifics to offer to the Court just other than the general circumstances.

THE COURT: Right. I think the general circumstances indicate that that's a slight factor in

favor of Mr. Gutierrez. So I'm going to depart downward from 300 months down to 192 months.

And so my final judgment is you're hereby committed to the custody of the Bureau of Prisons to be imprisoned for 192 months.

Is there a facility you'd like me to recommend?

MS. WINGERT: Yes. We'd like Victorville, California, or Terminal Island would be closest to his mother.

THE COURT: Okay. I haven't been to Victorville, but I've been to Terminal Island. It's in Long Beach. It's a very well-run facility, kind of a medium-security facility. It actually has a nice view of the ocean and the Long Beach Harbor, very well-run facility. So I'll recommend either one of those facilities to the Bureau of Prisons.

I'm also going to recommend the 500-hour residential drug treatment program where you can earn up to a year off your sentence, although the average inmate earned about eight months off their sentence. [19]

Upon release from imprisonment, you'll be placed on supervised release for ten years. While you're on supervised release, you can't violate any state, local, or federal law. You'll have the – you can't possess or use any illegal drugs. You'll never be allowed to possess a firearm, ammunition, destructive device, or dangerous weapon. And you'll have other standard conditions set out in your judgment order.

You'll have some special conditions. You'll participate and successfully complete a program of testing and treatment for substance abuse while you're

on supervised release. Also you're not allowed to use alcohol or go to bars, taverns, or other establishments whose primary source of income is derived from the sale of alcohol.

You'll participate in any mental health evaluation and treatment and take all medications that are duly authorized. You need to make efforts to pay your past and current child support obligations. And you need to cooperate with state authorities to help effectuate the collection of payment of those obligations.

While you're on supervised release, you need to look for full-time employment and participate in any employment workshops, training, et cetera, recommended by your United States probation officer. Until you obtain full-time employment, your United States probation officer may require you to do up to 20 hours of community service per week. [20]

You'll be subject to a standard search condition which means United States probation officers can search your person, residence, automobiles, motor vehicles, personal property, cameras, cellphones, computers, iPads, flash drives, electronic storage devices.

You don't have the ability to pay a fine, so the fine is waived. There's a hundred-dollar special assessment due and owing. You're remanded to the custody of the United States marshal.

Just a heads-up. If you were to be sentenced in federal court on another drug offense, you'd likely be looking at a mandatory life sentence with no possibility of release, so that means you would die in one of the 118 United States prisons.

There's an appeal waiver in this case which means you've given up your right to appeal. So unless the sentence that I imposed was illegal, unconstitutional, or in violation of your plea agreement, you would have no right to appeal. In those very limited situations, if you decided to appeal, you would need to file a written notice of appeal with the clerk of our court no later than 14 days from the date your judgment is filed. If you can't afford to pay for a lawyer, pay for the costs of an appeal, those costs would be paid on your behalf.

I'd ask the U.S. marshals to accommodate a family visit. [21]

Miss Wingert, anything else on behalf of Mr. Gutierrez?

MS. WINGERT: No, Your Honor.

THE COURT: Thank you for your representation.

Mr. Bowers, anything else on behalf of the United States?

MR. BOWERS: No, Your Honor.

THE COURT: Okay. Thank you for your representation. We'll be in recess.

(The foregoing sentencing was concluded at 9:44 a.m.)

United States Code Title 18
Crimes and Criminal Procedure
Part II. Criminal Procedure
Chapter 227: Sentences

18 U.S.C. § 3553. Imposition of a sentence

Effective: May 27, 2010

(a) Factors to be considered in imposing a sentence.— The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing

Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.—

(1) In general.—Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses

and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses.—

(A) Sentencing.—In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless—

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that—

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) Statement of reasons for imposing a sentence.– The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months,

the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form issued under section 994(w)(1)(B) of title 28, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence procedure for an order of notice.—Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall—

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) Limited authority to impose a sentence below a statutory minimum.—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) Limitation on applicability of statutory minimums in certain cases.—Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the

Government has been afforded the opportunity to make a recommendation, that—

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

United States Code Title 28
Judiciary and Judicial Procedure
Part III. Court Officers and Employees
Chapter 58: United States Sentencing Commission

28 U.S.C. § 994. Duties of the Commission

Effective: October 6, 2006

(a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of any Federal statute shall promulgate and distribute to all courts of the United States and to the United States Probation System—

(1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including—

(A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;

(B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;

(C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term;

(D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively; and

(E) a determination under paragraphs (6) and (11) of section 3563(b) of title 18;

(2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the (A) the sanctions set forth in sections 3554, 3555, and 3556 of title 18;

(B) the conditions of probation and supervised release set forth in sections 3563(b) and 3583(d) of title 18;

(C) the sentence modification provisions set forth in sections 3563(c), 3564, 3573, and 3582(c) of title 18;

(D) the fine imposition provisions set forth in section 3572 of title 18;

(E) the authority granted under rule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to rule 11(e)(1); and

(F) the temporary release provisions set forth in section 3622 of title 18, and the prerelease custody provisions set forth in section 3624(c) of title 18; and

(3) guidelines or general policy statements regarding the appropriate use of the provisions for revocation of probation set forth in section 3565 of title 18, and the provisions for modification of the term or conditions of supervised release and revocation of supervised release set forth in section 3583(e) of title 18.

(b)(1) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category

of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code.

(2) If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.

(c) The Commission, in establishing categories of offenses for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—

(1) the grade of the offense;

(2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;

(3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;

(4) the community view of the gravity of the offense;

(5) the public concern generated by the offense;

(6) the deterrent effect a particular sentence may have on the commission of the offense by others; and

(7) the current incidence of the offense in the community and in the Nation as a whole.

(d) The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—

(1) age;

(2) education;

(3) vocational skills;

(4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;

(5) physical condition, including drug dependence;

(6) previous employment record;

(7) family ties and responsibilities;

(8) community ties;

(9) role in the offense;

(10) criminal history; and

(11) degree of dependence upon criminal activity for a livelihood.

The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.

(e) The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.

(f) The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.

(g) The Commission, in promulgating guidelines pursuant to subsection (a)(1) to meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code, shall take into account the nature and capacity of the penal, correctional, and other facilities and services available, and shall make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might become necessary as a result of the

guidelines promulgated pursuant to the provisions of this chapter. The sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission.

(h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and—

(1) has been convicted of a felony that is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46; and

(2) has previously been convicted of two or more prior felonies, each of which is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46.

(i) The Commission shall assure that the guidelines specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant—

(1) has a history of two or more prior Federal, State, or local felony convictions for offenses committed on different occasions;

(2) committed the offense as part of a pattern of criminal conduct from which the defendant derived a substantial portion of the defendant's income;

(3) committed the offense in furtherance of a conspiracy with three or more persons engaging in a pattern of racketeering activity in which the defendant participated in a managerial or supervisory capacity;

(4) committed a crime of violence that constitutes a felony while on release pending trial, sentence, or appeal from a Federal, State, or local felony for which he was ultimately convicted; or

(5) committed a felony that is set forth in section 401 or 1010 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 841 and 960), and that involved trafficking in a substantial quantity of a controlled substance.

(j) The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury.

(k) The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the

defendant with needed educational or vocational training, medical care, or other correctional treatment.

(l) The Commission shall insure that the guidelines promulgated pursuant to subsection (a)(1) reflect—

(1) the appropriateness of imposing an incremental penalty for each offense in a case in which a defendant is convicted of—

(A) multiple offenses committed in the same course of conduct that result in the exercise of ancillary jurisdiction over one or more of the offenses; and

(B) multiple offenses committed at different times, including those cases in which the subsequent offense is a violation of section 3146 (penalty for failure to appear) or is committed while the person is released pursuant to the provisions of section 3147 (penalty for an offense committed while on release) of title 18; and

(2) the general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit an offense or soliciting commission of an offense and for an offense that was the sole object of the conspiracy or solicitation.

(m) The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense. This will require that, as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the

Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served. The Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code.

(n) The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

(o) The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section. In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system. The United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's

guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work.

(p) The Commission, at or after the beginning of a regular session of Congress, but not later than the first day of May, may promulgate under subsection (a) of this section and submit to Congress amendments to the guidelines and modifications to previously submitted amendments that have not taken effect, including modifications to the effective dates of such amendments. Such an amendment or modification shall be accompanied by a statement of the reasons therefor and shall take effect on a date specified by the Commission, which shall be no earlier than 180 days after being so submitted and no later than the first day of November of the calendar year in which the amendment or modification is submitted, except to the extent that the effective date is revised or the amendment is otherwise modified or disapproved by Act of Congress.

(q) The Commission and the Bureau of Prisons shall submit to Congress an analysis and recommendations concerning maximum utilization of resources to deal effectively with the Federal prison population. Such report shall be based upon consideration of a variety of alternatives, including—

(1) modernization of existing facilities;

(2) inmate classification and periodic review of such classification for use in placing inmates in the least restrictive facility necessary to ensure adequate security; and

(3) use of existing Federal facilities, such as those currently within military jurisdiction.

(r) The Commission, not later than two years after the initial set of sentencing guidelines promulgated under subsection (a) goes into effect, and thereafter whenever it finds it advisable, shall recommend to the Congress that it raise or lower the grades, or otherwise modify the maximum penalties, of those offenses for which such an adjustment appears appropriate.

(s) The Commission shall give due consideration to any petition filed by a defendant requesting modification of the guidelines utilized in the sentencing of such defendant, on the basis of changed circumstances unrelated to the defendant, including changes in—

(1) the community view of the gravity of the offense;

(2) the public concern generated by the offense; and

(3) the deterrent effect particular sentences may have on the commission of the offense by others.

(t) The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

(u) If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by

what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.

(v) The Commission shall ensure that the general policy statements promulgated pursuant to subsection (a)(2) include a policy limiting consecutive terms of imprisonment for an offense involving a violation of a general prohibition and for an offense involving a violation of a specific prohibition encompassed within the general prohibition.

(w)(1) The Chief Judge of each district court shall ensure that, within 30 days following entry of judgment in every criminal case, the sentencing court submits to the Commission, in a format approved and required by the Commission, a written report of the sentence, the offense for which it is imposed, the age, race, sex of the offender, and information regarding factors made relevant by the guidelines. The report shall also include—

(A) the judgment and commitment order;

(B) the written statement of reasons for the sentence imposed (which shall include the reason for any departure from the otherwise applicable guideline range and which shall be stated on the written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission);

(C) any plea agreement;

(D) the indictment or other charging document;

(E) the presentence report; and

(F) any other information as the Commission finds appropriate.

The information referred to in subparagraphs (A) through (F) shall be submitted by the sentencing court in a format approved and required by the Commission.

(2) The Commission shall, upon request, make available to the House and Senate Committees on the Judiciary, the written reports and all underlying records accompanying those reports described in this section, as well as other records received from courts.

(3) The Commission shall submit to Congress at least annually an analysis of these documents, any recommendations for legislation that the Commission concludes is warranted by that analysis, and an accounting of those districts that the Commission believes have not submitted the appropriate information and documents required by this section.

(4) The Commission shall make available to the Attorney General, upon request, such data files as the Commission itself may assemble or maintain in electronic form as a result of the information submitted under paragraph (1). Such data files shall be made available in electronic form and shall include all data fields requested, including the identity of the sentencing judge.

(x) The provisions of section 553 of title 5, relating to publication in the Federal Register and public hearing procedure, shall apply to the promulgation of guidelines pursuant to this section.

(y) The Commission, in promulgating guidelines pursuant to subsection (a)(1), may include, as a component of a fine, the expected costs to the Government of any imprisonment, supervised release, or probation sentence that is ordered.

United States Sentencing Commission
Guidelines Manual
Chapter One, Part B.

USSG § 1B1.1 Application Instructions

(a) The court shall determine the kinds of sentence and the guideline range as set forth in the guidelines (see 18 U.S.C. § 3553(a)(4)) by applying the provisions of this manual in the following order, except as specifically directed:

(1) Determine, pursuant to § 1B1.2 (Applicable Guidelines), the offense guideline section from Chapter Two (Offense Conduct) applicable to the offense of conviction. *See* § 1B1.2.

(2) Determine the base offense level and apply any appropriate specific offense characteristics, cross references, and special instructions contained in the particular guideline in Chapter Two in the order listed.

(3) Apply the adjustments as appropriate related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three.

(4) If there are multiple counts of conviction, repeat steps (1) through (3) for each count. Apply Part D of Chapter Three to group the various counts and adjust the offense level accordingly.

(5) Apply the adjustment as appropriate for the defendant's acceptance of responsibility from Part E of Chapter Three.

(6) Determine the defendant's criminal history category as specified in Part A of Chapter Four. Determine from Part B of Chapter Four any other applicable adjustments.

(7) Determine the guideline range in Part A of Chapter Five that corresponds to the offense level and criminal history category determined above.

(8) For the particular guideline range, determine from Parts B through G of Chapter Five the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution.

(b) The court shall then consider Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence. *See* 18 U.S.C. § 3553(a)(5).

(c) The court shall then consider the applicable factors in 18 U.S.C. § 3553(a) taken as a whole. *See* 18 U.S.C. § 3553(a).

United States Sentencing Commission
Guidelines Manual
Chapter One, Part B.

USSG § 1B1.10
Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)

(a) Authority.—

(1) In General.—In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (d) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). As required by 18 U.S.C. § 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.

(2) Exclusions.—A reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2) if—

(A) none of the amendments listed in subsection (d) is applicable to the defendant; or

(B) an amendment listed in subsection (d) does not have the effect of lowering the defendant's applicable guideline range.

(3) Limitation.—Consistent with subsection (b), proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.

(b) Determination of Reduction in Term of Imprisonment.—

(1) In General.—In determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (d) had been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the amendments listed in subsection (d) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.

(2) Limitation and Prohibition on Extent of Reduction.—

(A) Limitation.—Except as provided in subdivision (B), the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.

(B) Exception for Substantial Assistance.—If the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant's substantial assistance to authorities, a reduction comparably less than the

amended guideline range determined under subdivision (1) of this subsection may be appropriate.

(C) Prohibition.—In no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.

(c) Cases Involving Mandatory Minimum Sentences and Substantial Assistance.—If the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined without regard to the operation of § 5G1.1 (Sentencing on a Single Count of Conviction) and § 5G1.2 (Sentencing on Multiple Counts of Conviction).

(d) Covered Amendments.—Amendments covered by this policy statement are listed in Appendix C as follows: 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, 505, 506, 516, 591, 599, 606, 657, 702, 706 as amended by 711, 715, 750 (parts A and C only), and 782 (subject to subsection (e)(1)).

(e) Special Instruction.—

(1) The court shall not order a reduced term of imprisonment based on Amendment 782 unless the effective date of the court's order is November 1, 2015, or later.

Commentary

Application Notes:

1. Application of Subsection (a).—

(A) Eligibility.—Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (d) that lowers the applicable guideline range (i.e., the guideline range that corresponds to the offense level and criminal history category determined pursuant to § 1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or any variance). Accordingly, a reduction in the defendant's term of imprisonment is not authorized under 18 U.S.C. § 3582(c)(2) and is not consistent with this policy statement if: (i) none of the amendments listed in subsection (d) is applicable to the defendant; or (ii) an amendment listed in subsection (d) is applicable to the defendant but the amendment does not have the effect of lowering the defendant's applicable guideline range because of the operation of another guideline or statutory provision (*e.g.*, a statutory mandatory minimum term of imprisonment).

(B) Factors for Consideration.—

(i) In General.—Consistent with 18 U.S.C. § 3582(c)(2), the court shall consider the factors set forth in 18 U.S.C. § 3553(a) in determining: (I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

(ii) Public Safety Consideration.—The court shall consider the nature and seriousness of the

danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment in determining: (I) whether such a reduction is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

(iii) Post-Sentencing Conduct.—The court may consider post-sentencing conduct of the defendant that occurred after imposition of the term of imprisonment in determining: (I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

2. Application of Subsection (b)(1).—In determining the amended guideline range under subsection (b)(1), the court shall substitute only the amendments listed in subsection (d) for the corresponding guideline provisions that were applied when the defendant was sentenced. All other guideline application decisions remain unaffected.

3. Application of Subsection (b)(2).—Under subsection (b)(2), the amended guideline range determined under subsection (b)(1) and the term of imprisonment already served by the defendant limit the extent to which the court may reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement. Specifically, as provided in subsection (b)(2)(A), if the term of imprisonment imposed was within the guideline range applicable to the defendant at the time of

sentencing, the court may reduce the defendant's term of imprisonment to a term that is no less than the minimum term of imprisonment provided by the amended guideline range determined under subsection (b)(1). For example, in a case in which: (A) the guideline range applicable to the defendant at the time of sentencing was 70 to 87 months; (B) the term of imprisonment imposed was 70 months; and (C) the amended guideline range determined under subsection (b)(1) is 51 to 63 months, the court may reduce the defendant's term of imprisonment, but shall not reduce it to a term less than 51 months.

If the term of imprisonment imposed was outside the guideline range applicable to the defendant at the time of sentencing, the limitation in subsection (b)(2)(A) also applies. Thus, if the term of imprisonment imposed in the example provided above was not a sentence of 70 months (within the guidelines range) but instead was a sentence of 56 months (constituting a downward departure or variance), the court likewise may reduce the defendant's term of imprisonment, but shall not reduce it to a term less than 51 months.

Subsection (b)(2)(B) provides an exception to this limitation, which applies if the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant's substantial assistance to authorities. In such a case, the court may reduce the defendant's term, but the reduction is not

limited by subsection (b)(2)(A) to the minimum of the amended guideline range. Instead, as provided in subsection (b)(2)(B), the court may, if appropriate, provide a reduction comparably less than the amended guideline range. Thus, if the term of imprisonment imposed in the example provided above was 56 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities (representing a downward departure of 20 percent below the minimum term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing), a reduction to a term of imprisonment of 41 months (representing a reduction of approximately 20 percent below the minimum term of imprisonment provided by the amended guideline range) would amount to a comparable reduction and may be appropriate.

The provisions authorizing such a government motion are § 5K1.1 (Substantial Assistance to Authorities) (authorizing, upon government motion, a downward departure based on the defendant's substantial assistance); 18 U.S.C. § 3553(e) (authorizing the court, upon government motion, to impose a sentence below a statutory minimum to reflect the defendant's substantial assistance); and Fed. R. Crim. P. 35(b) (authorizing the court, upon government motion, to reduce a sentence to reflect the defendant's substantial assistance).

In no case, however, shall the term of imprisonment be reduced below time served. See subsection (b)(2)(C). Subject to these limitations, the sentencing court has the discretion to determine

whether, and to what extent, to reduce a term of imprisonment under this section.

4. Application of Subsection (c).—As stated in subsection (c), if the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined without regard to the operation of § 5G1.1 (Sentencing on a Single Count of Conviction) and § 5G1.2 (Sentencing on Multiple Counts of Conviction). For example:

(A) Defendant A is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing was 135 to 168 months, which is entirely above the mandatory minimum, and the court imposed a sentence of 101 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 108 to 135 months. Ordinarily, § 5G1.1 would operate to restrict the amended guideline range to 120 to 135 months, to reflect the mandatory minimum term of imprisonment. For purposes of this policy statement, however, the amended guideline range remains 108 to 135 months.

To the extent the court considers it appropriate to provide a reduction comparably less than the

amended guideline range pursuant to subsection (b)(2)(B), Defendant A's original sentence of 101 months amounted to a reduction of approximately 25 percent below the minimum of the original guideline range of 135 months. Therefore, an amended sentence of 81 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 108 months) would amount to a comparable reduction and may be appropriate.

(B) Defendant B is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing (as calculated on the Sentencing Table) was 108 to 135 months, which was restricted by operation of § 5G1.1 to a range of 120 to 135 months. *See* § 5G1.1(c)(2). The court imposed a sentence of 90 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 87 to 108 months. Ordinarily, § 5G1.1 would operate to restrict the amended guideline range to precisely 120 months, to reflect the mandatory minimum term of imprisonment. *See* § 5G1.1(b). For purposes of this policy statement, however, the amended guideline range is considered to be 87 to 108 months (*i.e.*, unrestricted by operation of § 5G1.1 and the statutory minimum of 120 months).

To the extent the court considers it appropriate to provide a reduction comparably less than the

amended guideline range pursuant to subsection (b)(2)(B), Defendant B's original sentence of 90 months amounted to a reduction of approximately 25 percent below the original guideline range of 120 months. Therefore, an amended sentence of 65 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 87 months) would amount to a comparable reduction and may be appropriate.

5. Application to Amendment 750 (Parts A and C Only).—As specified in subsection (d), the parts of Amendment 750 that are covered by this policy statement are Parts A and C only. Part A amended the Drug Quantity Table in § 2D1.1 for crack cocaine and made related revisions to the Drug Equivalency Tables in the Commentary to § 2D1.1 (*see* § 2D1.1, comment. (n.8)). Part C deleted the cross reference in § 2D2.1(b) under which an offender who possessed more than 5 grams of crack cocaine was sentenced under § 2D1.1.

6. Application to Amendment 782.—As specified in subsection (d) and (e)(1), Amendment 782 (generally revising the Drug Quantity Table and chemical quantity tables across drug and chemical types) is covered by this policy statement only in cases in which the order reducing the defendant's term of imprisonment has an effective date of November 1, 2015, or later.

A reduction based on retroactive application of Amendment 782 that does not comply with the requirement that the order take effect on November 1, 2015, or later is not consistent with

this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2).

Subsection (e)(1) does not preclude the court from conducting sentence reduction proceedings and entering orders under 18 U.S.C. § 3582(c)(2) and this policy statement before November 1, 2015, provided that any order reducing the defendant's term of imprisonment has an effective date of November 1, 2015, or later.

7. Supervised Release.—

(A) Exclusion Relating to Revocation.—Only a term of imprisonment imposed as part of the original sentence is authorized to be reduced under this section. This section does not authorize a reduction in the term of imprisonment imposed upon revocation of supervised release.

(B) Modification Relating to Early Termination.—If the prohibition in subsection (b)(2)(C) relating to time already served precludes a reduction in the term of imprisonment to the extent the court determines otherwise would have been appropriate as a result of the amended guideline range determined under subsection (b)(1), the court may consider any such reduction that it was unable to grant in connection with any motion for early termination of a term of supervised release under 18 U.S.C. § 3583(e)(1). However, the fact that a defendant may have served a longer term of imprisonment than the court determines would have been appropriate in view of the amended guideline range determined under

subsection (b)(1) shall not, without more, provide a basis for early termination of supervised release. Rather, the court should take into account the totality of circumstances relevant to a decision to terminate supervised release, including the term of supervised release that would have been appropriate in connection with a sentence under the amended guideline range determined under subsection (b)(1).

8. Use of Policy Statement in Effect on Date of Reduction.—Consistent with subsection (a) of § 1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing), the court shall use the version of this policy statement that is in effect on the date on which the court reduces the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2).

Background: Section 3582(c)(2) of Title 18, United States Code, provides: "[I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."

This policy statement provides guidance and limitations for a court when considering a motion under 18 U.S.C. § 3582(c)(2) and implements 28 U.S.C.

§ 994(u), which provides: "If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." The Supreme Court has concluded that proceedings under section 3582(c)(2) are not governed by *United States v. Booker*, 543 U.S. 220 (2005), and this policy statement remains binding on courts in such proceedings. *See Dillon v. United States*, 560 U.S. 817 (2010).

Among the factors considered by the Commission in selecting the amendments included in subsection (d) were the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under subsection (b)(1).

The listing of an amendment in subsection (d) reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants. The authorization of such a discretionary reduction does not otherwise affect the lawfulness of a previously imposed sentence, does not authorize a reduction in any other component of the sentence, and does not entitle a defendant to a reduced term of imprisonment as a matter of right.

The Commission has not included in this policy statement amendments that generally reduce the maximum of the guideline range by less than six months. This criterion is in accord with the legislative history of 28 U.S.C. § 994(u) (formerly § 994(t)), which states: "It should be noted that the Committee does not expect that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the old guidelines' or when there is only a minor downward adjustment in the guidelines. The Committee does not believe the courts should be burdened with adjustments in these cases." S. Rep. 225, 98th Cong., 1st Sess. 180 (1983).

United States Sentencing Commission
Guidelines Manual
Chapter Five, Part G.

USSG § 5G1.1
Sentencing on a Single Count of Conviction

(a) Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence.

(b) Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.

(c) In any other case, the sentence may be imposed at any point within the applicable guideline range, provided that the sentence —

(1) is not greater than the statutorily authorized maximum sentence, and

(2) is not less than any statutorily required minimum sentence.

United States Sentencing Commission
Guidelines Manual
Supplement to Appendix C

Amendments to the Guidelines Manual

780. Amendment

Section1B1.10 is amended in each of subsections (a)(1), (a)(2)(A), (a)(2)(B), and (b)(1) by striking "subsection (c)" each place such term appears and inserting "subsection (d)"; by redesignating subsection (c) as subsection (d); and by inserting after subsection (b) the following new subsection (c):

> "(c) Cases Involving Mandatory Minimum Sentences and Substantial Assistance.—If the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined without regard to the operation of § 5G1.1 (Sentencing on a Single Count of Conviction) and § 5G1.2 (Sentencing on Multiple Counts of Conviction).".

The Commentary to § 1B1.10 captioned "Application Notes" is amended in Notes 1(A), 2, and 4 by striking "subsection (c)" each place such term appears and inserting "subsection (d)"; by redesignating Notes 4 through 6 as Notes 5 through 7, respectively; and by inserting after Note 3 the following new Note 4:

"4. Application of Subsection (c).—As stated in subsection (c), if the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined without regard to the operation of § 5G1.1 (Sentencing on a Single Count of Conviction) and § 5G1.2 (Sentencing on Multiple Counts of Conviction). For example:

(A) Defendant A is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing was 135 to 168 months, which is entirely above the mandatory minimum, and the court imposed a sentence of 101 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 108 to 135 months. Ordinarily, § 5G1.1 would operate to restrict the amended guideline range to 120 to 135 months, to reflect the mandatory minimum term of imprisonment. For purposes of this policy statement, however, the amended guideline range remains 108 to 135 months.

To the extent the court considers it appropriate to provide a reduction

comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant A's original sentence of 101 months amounted to a reduction of approximately 25 percent below the minimum of the original guideline range of 135 months. Therefore, an amended sentence of 81 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 108 months) would amount to a comparable reduction and may be appropriate.

(B) Defendant B is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing (as calculated on the Sentencing Table) was 108 to 135 months, which was restricted by operation of § 5G1.1 to a range of 120 to 135 months. *See* § 5G1.1(c)(2). The court imposed a sentence of 90 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 87 to 108 months. Ordinarily, § 5G1.1 would operate to restrict the amended guideline range to precisely 120 months, to reflect the mandatory minimum term of imprisonment. *See* § 5G1.1(b). For purposes of this policy statement, however, the amended guideline range is considered to be 87 to 108 months (*i.e.*, unrestricted by

operation of § 5G1.1 and the statutory minimum of 120 months).

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant B's original sentence of 90 months amounted to a reduction of approximately 25 percent below the original guideline range of 120 months. Therefore, an amended sentence of 65 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 87 months) would amount to a comparable reduction and may be appropriate.".

The Commentary to § 1B1.10 captioned "Background" is amended by striking "subsection (c)" both places such term appears and inserting "subsection (d)".

Reason for Amendment: This amendment clarifies an application issue that has arisen with respect to § 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range) (Policy Statement). Circuits have conflicting interpretations of when, if at all, § 1B1.10 provides that a statutory minimum continues to limit the amount by which a defendant's sentence may be reduced under 18 U.S.C. § 3582(c)(2) when the defendant's original sentence was below the statutory minimum due to substantial assistance.

This issue arises in two situations. First, there are cases in which the defendant's original guideline range was above the mandatory minimum but the defendant

received a sentence below the mandatory minimum pursuant to a government motion for substantial assistance. For example, consider a case in which the mandatory minimum was 240 months, the original guideline range was 262 to 327 months, and the defendant's original sentence was 160 months, representing a 39 percent reduction for substantial assistance below the bottom of the guideline range. In a sentence reduction proceeding pursuant to Amendment 750, the amended guideline range as determined on the Sentencing Table is 168 to 210 months, but after application of the "trumping" mechanism in § 5G1.1 (Sentencing on a Single Count of Conviction), the mandatory minimum sentence of 240 months is the guideline sentence. *See* § 5G1.1(b). Section 1B1.10(b)(2)(B) provides that such a defendant may receive a comparable 39 percent reduction from the bottom of the amended guideline range, but circuits are split over what to use as the bottom of the range.

The Eighth Circuit has taken the view that the bottom of the amended guideline range in such a case would be 240 months, i.e., the guideline sentence that results after application of the "trumping" mechanism in § 5G1.1. *See United States v. Golden*, 709 F.3d 1229, 1231-33 (8th Cir. 2013). In contrast, the Seventh Circuit has taken the view that the bottom of the amended guideline range in such a case would be 168 months, *i.e.*, the bottom of the amended range as determined by the Sentencing Table, without application of the "trumping" mechanism in § 5G1.1. *See United States v. Wren*, 706 F.3d 861, 863 (7th Cir. 2013). Each circuit found support for its view in an Eleventh Circuit decision, *United States v. Liberse*,

688 F.3d 1198 (11th Cir. 2012), which also discussed this issue.

Second, there are cases in which the defendant's original guideline range as determined by the Sentencing Table was, at least in part, below the mandatory minimum, and the defendant received a sentence below the mandatory minimum pursuant to a government motion for substantial assistance. In these cases, the "trumping" mechanism in § 5G1.1 operated at the original sentence to restrict the guideline range to be no less than the mandatory minimum. For example, consider a case in which the original Sentencing Table guideline range was 140 to 175 months but the mandatory minimum was 240 months, resulting (after operation of § 5G1.1) in a guideline sentence of 240 months. The defendant's original sentence was 96 months, representing a 60 percent reduction for substantial assistance below the statutory and guideline minimum. In a sentence reduction proceeding, the amended Sentencing Table guideline range is 110 to 137 months, resulting (after operation of § 5G1.1) in a guideline sentence of 240 months. Section 1B1.10(b)(2)(B) provides that such a defendant may receive a reduction from the bottom of the amended guideline range, but circuits are split over what to use as the bottom of the range.

The Eleventh Circuit, the Sixth Circuit, and the Second Circuit have taken the view that the bottom of the amended range in such a case would remain 240 months, i.e., the guideline sentence that results after application of the "trumping" mechanism in § 5G1.1. *See United States v. Glover*, 686 F.3d 1203, 1208 (11th Cir. 2012); *United States v. Joiner*, 727 F.3d 601 (6th

Cir. 2013); *United States v. Johnson*, 732 F.3d 109 (2d Cir. 2013). Under these decisions, the defendant in the example would have an original range of 240 months and an amended range of 240 months, and would not be eligible for any reduction because the range has not been lowered. In contrast, the Third Circuit and the District of Columbia Circuit have taken the view that the bottom of the amended range in such a case would be 110 months, *i.e.*, the bottom of the Sentencing Table guideline range. *See United States v. Savani*, 733 F.3d 56, 66-7 (3d Cir. 2013); *In re Sealed Case*, 722 F.3d 361, 369-70 (D.C. Cir. 2013).

The amendment generally adopts the approach of the Third Circuit in Savani and the District of Columbia Circuit in *In re Sealed Case*. It amends § 1B1.10 to specify that, if the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of § 1B1.10 the amended guideline range shall be determined without regard to the operation of § 5G1.1 and § 5G1.2. The amendment also adds a new application note with examples.

This clarification ensures that defendants who provide substantial assistance to the government in the investigation and prosecution of others have the opportunity to receive the full benefit of a reduction that accounts for that assistance. *See* USSG App. C. Amend 759 (Reason for Amendment). As the Commission noted in the reason for that amendment: "The guidelines and the relevant statutes have long recognized that defendants who provide substantial

assistance are differently situated than other defendants and should be considered for a sentence below a guideline or statutory minimum even when defendants who are otherwise similar (but did not provide substantial assistance) are subject to a guideline or statutory minimum. Applying this principle when the guideline range has been reduced and made available for retroactive application under section 3582(c)(2) appropriately maintains this distinction and furthers the purposes of sentencing." *Id.*

Effective Date: The effective date of this amendment is November 1, 2014.

United States Sentencing Commission
Guidelines Manual
Supplement to Appendix C

Amendments to the Guidelines Manual

782. Amendment

Section 2D1.1(c) is amended by striking paragraph (17); by redesignating paragraphs (1) through (16) as paragraphs (2) through (17), respectively; and by inserting before paragraph (2) (as so redesignated) the following new paragraph (1):

"(1)	• 90 KG or more of Heroin;	**Level 38**
	• 450 KG or more of Cocaine;	
	• 25.2 KG or more of Cocaine Base;	
	• 90 KG or more of PCP, or 9 KG or more of PCP (actual);	
	• 45 KG or more of Methamphetamine, or 4.5 KG or more of Methamphetamine (actual), or 4.5 KG or more of 'Ice';	
	• 45 KG or more of Amphetamine, or 4.5 KG or more of Amphetamine (actual);	
	• 900 G or more of LSD;	
	• 36 KG or more of Fentanyl;	
	• 9 KG or more of a Fentanyl Analogue;	
	• 90,000 KG or more of Marihuana;	

• 18,000 KG or more of Hashish;

• 1,800 KG or more of Hashish Oil;

• 90,000,000 units or more of Ketamine;

• 90,000,000 units or more of Schedule I or II Depressants;

• 5,625,000 units or more of Flunitrazepam.".

Section 2D.1(c)(2) (as so redesignated) is amended to read as follows:

"(2) • At least 30 KG but less than 90 KG of Heroin; **Level 36**

• At least 150 KG but less than 450 KG of Cocaine;

• At least 8.4 KG but less than 25.2 KG of Cocaine Base;

• At least 30 KG but less than 90 KG of PCP, or at least 3 KG but less than 9 KG of PCP (actual);

• At least 15 KG but less than 45 KG of Methamphetamine, or

at least 1.5 KG but less than 4.5 KG of Methamphetamine (actual), or

at least 1.5 KG but less than 4.5 KG of 'Ice';

• At least 15 KG but less than 45 KG of Amphetamine, or

at least 1.5 KG but less than 4.5 KG of Amphetamine (actual);

• At least 300 G but less than 900 G of LSD;

• At least 12 KG but less than 36 KG of Fentanyl;

• At least 3 KG but less than 9 KG of a Fentanyl Analogue;

• At least 30,000 KG but less than 90,000 KG of Marihuana;

• At least 6,000 KG but less than 18,000 KG of Hashish;

• At least 600 KG but less than 1,800 KG of Hashish Oil;

• At least 30,000,000 units but less than 90,000,000 units of Ketamine;

• At least 30,000,000 units but less than 90,000,000 units of Schedule I or II Depressants;

• At least 1,875,000 units but less than 5,625,000 units of Flunitrazepam.".

Section 2D1.1(c)(3) (as so redesignated) is amended by striking "Level 36" and inserting "Level 34".

Section 2D1.1(c)(4) (as so redesignated) is amended by striking "Level 34" and inserting "Level 32".

Section 2D1.1(c)(5) (as so redesignated) is amended by striking "Level 32" and inserting "Level 30"; and by inserting before the line referenced to Flunitrazepam the following:

" • 1,000,000 units or more of Schedule III Hydrocodone;".

Section 2D1.1(c)(6) (as so redesignated) is amended by striking "Level 30" and inserting "Level 28"; and in the line referenced to Schedule III Hydrocode by striking "700,000 or more" and inserting "At least 700,000 but less than 1,000,000".

Section 2D1.1(c)(7) (as so redesignated) is amended by striking "Level 28" and inserting "Level 26".

Section 2D1.1(c)(8) (as so redesignated) is amended by striking "Level 26" and inserting "Level 24".

Section 2D1.1(c)(9) (as so redesignated) is amended by striking "Level 24" and inserting "Level 22".

Section 2D1.1(c)(10) (as so redesignated) is amended by striking "Level 22" and inserting "Level 20"; and by inserting before the line referenced to Flunitrazepam the following:

" • 60,000 units or more of Schedule III substances (except Ketamine or Hydrocodone);".

Section 2D1.1(c)(11) (as so redesignated) is amended by striking "Level 20" and inserting "Level 18"; and in the line referenced to Schedule III substances (except Ketamine or Hydrocodone) by striking "40,000 or more" and inserting "At least 40,000 but less than 60,000".

Section 2D1.1(c)(12) (as so redesignated) is amended by striking "Level 18" and inserting "Level 16".

Section 2D1.1(c)(13) (as so redesignated) is amended by striking "Level 16" and inserting "Level 14".

Section 2D1.1(c)(14) (as so redesignated) is amended by striking "Level 14" and inserting "Level 12"; by striking the line referenced to Heroin and all that follows through the line referenced to Fentanyl Analogue and inserting the following:

"(14) • Less than 10 G of Heroin; **Level 12**

• Less than 50 G of Cocaine;

• Less than 2.8 G of Cocaine Base;

• Less than 10 G of PCP, or

less than 1 G of PCP (actual);

• Less than 5 G of Methamphetamine, or

less than 500 MG of Methamphetamine (actual),

or less than 500 MG of 'Ice';

• Less than 5 G of Amphetamine, or

less than 500 MG of Amphetamine (actual);

• Less than 100 MG of LSD;

• Less than 4 G of Fentanyl;

• Less than 1 G of a Fentanyl Analogue;";

by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon; and by adding at the end [of] the following:

" • 80,000 units or more of Schedule IV substances (except Flunitrazepam).".

Section 2D1.1(c)(15) (as so redesignated) is amended by striking "Level 12" and inserting "Level 10"; by striking the line referenced to Heroin and all that follows through the line referenced to Fentanyl Analogue; and in the line referenced to Schedule IV substances (except Flunitrazepam) by striking "40,000 or more" and inserting "At least 40,000 but less than 80,000".

Section 2D1.1(c)(16) (as so redesignated) is amended by striking "Level 10" and inserting "Level 8"; in the line referenced to Flunitrazepam by striking "At least 62 but less" and inserting "Less"; by striking the period at the end of the line referenced to Schedule IV substances (except Flunitrazepam) and inserting a semicolon; and by adding at the end the following:

" • 160,000 units or more of Schedule V substances.".

Section 2D1.1(c)(17) (as so redesignated) is amended to read as follows:

"(17) • Less than 1 KG of Marihuana; **Level 6**

• Less than 200 G of Hashish;

• Less than 20 G of Hashish Oil;

• Less than 1,000 units of Ketamine;

• Less than 1,000 units of Schedule I or II Depressants;

• Less than 1,000 units of Schedule III Hydrocodone;

• Less than 1,000 units of Schedule III substances (except Ketamine or Hydrocodone);

• Less than 16,000 units of Schedule IV substances (except Flunitrazepam);

• Less than 160,000 units of Schedule V substances.".

The annotation to § 2D1.1(c) captioned "Notes to Drug Quantity Table" is amended in Note (E) by striking "100 G" and inserting "100 grams"; in Note (F) by striking "0.5 ml" and "25 mg" and inserting "0.5 milliliters" and "25 milligrams", respectively; and in Note (G) by striking "0.4 mg" and inserting "0.4 milligrams".

The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 8(A) by striking "1 gm", "5 kg", "100 gm", and "500 kg" and inserting "1 gram", "5 kilograms", "100 grams", and "500 kilograms", respectively, and by striking "28" and inserting "26"; in Note 8(B) by striking "999 grams" and inserting "2.49 kilograms"; in Note 8(C)(i) by striking "22" and inserting "20", by striking "18" and inserting "16", and by striking "24" and inserting "22"; in Note 8(C)(ii) by striking "8" both places such term appears and inserting "6", by striking "five kilograms" and inserting "10,000 units", and by striking "10" and inserting "8"; in Note 8(C)(iii) by striking "16" and inserting "14", by striking "14" and inserting "12", and by striking "18" and inserting "16"; in Note 8(C)(iv) by striking "56,000" and inserting "76,000", by striking "100,000" and inserting "200,000", by striking "200,000" and inserting "600,000", by striking "56" and inserting "76", by striking "59.99" and inserting "79.99", by striking "4.99" and inserting "9.99", by

striking "6.25" and inserting "12.5", by striking "999 grams" and inserting "2.49 kilograms", by striking "1.25" and inserting "3.75", by striking "59.99" and inserting "79.99", and by striking "61.99 (56 + 4.99 + .999)" and inserting "88.48 (76 + 9.99 + 2.49)"; in Note 8(D), under the heading relating to Schedule III Substances (except ketamine and hydrocodone), by striking "59.99" and inserting "79.99"; under the heading relating to Schedule III Hydrocodone, by striking "999.99" and inserting "2,999.99"; under the heading relating to Schedule IV Substances (except flunitrazepam) by striking "4.99" and inserting "9.99"; and under the heading relating to Schedule V Substances by striking "999 grams" and inserting "2.49 kilograms"; and in Note 9 by striking "500 mg" and "50 gms" and inserting "500 milligrams" and "50 grams", respectively.

The Commentary to § 2D1.1 captioned "Background" is amended in the paragraph that begins "The base offense levels in § 2D1.1" by striking "32 and 26" and inserting "30 and 24"; and by striking the paragraph that begins "The base offense levels at levels 26 and 32" as follows:

> "The base offense levels at levels 26 and 32 establish guideline ranges with a lower limit as close to the statutory minimum as possible; *e.g.*, level 32 ranges from 121 to 151 months, where the statutory minimum is ten years or 120 months.",

and inserting the following new paragraph:

> "The base offense levels at levels 24 and 30 establish guideline ranges such that the

statutory minimum falls within the range; *e.g.*, level 30 ranges from 97 to 121 months, where the statutory minimum term is ten years or 120 months.".

The Commentary to § 2D1.2 captioned "Application Note" is amended in Note 1 by striking "16" and inserting "14"; and by striking "17" and inserting "15".

Section 2D1.11(d) is amended by striking paragraph (14); by redesignating paragraphs (1) through (13) as paragraphs (2) through (14), respectively; and by inserting before paragraph (2) (as so redesignated) the following new paragraph (1):

"(1)	9 KG or more of Ephedrine;	**Level 38**
	9 KG or more of Phenylpropanolamine;	
	9 KG or more of Pseudoephedrine.".	

Section 2D1.11(d)(2) (as so redesignated) is amended by striking "Level 38" and inserting "Level 36"; and by striking "3 KG or more" each place such term appears and inserting "At least 3 KG but less than 9 KG".

Section 2D1.11(d)(3) (as so redesignated) is amended by striking "Level 36" and inserting "Level 34".

Section 2D1.11(d)(4) (as so redesignated) is amended by striking "Level 34" and inserting "Level 32".

Section 2D1.11(d)(5) (as so redesignated) is amended by striking "Level 32" and inserting "Level 30".

Section 2D1.11(d)(6) (as so redesignated) is amended by striking "Level 30" and inserting "Level 28".

Section 2D1.11(d)(7) (as so redesignated) is amended by striking "Level 28" and inserting "Level 26".

Section 2D1.11(d)(8) (as so redesignated) is amended by striking "Level 26" and inserting "Level 24".

Section 2D1.11(d)(9) (as so redesignated) is amended by striking "Level 24" and inserting "Level 22".

Section 2D1.11(d)(10) (as so redesignated) is amended by striking "Level 22" and inserting "Level 20".

Section 2D1.11(d)(11) (as so redesignated) is amended by striking "Level 20" and inserting "Level 18".

Section 2D1.11(d)(12) (as so redesignated) is amended by striking "Level 18" and inserting "Level 16".

Section 2D1.11(d)(13) (as so redesignated) is amended by striking "Level 16" and inserting "Level 14".

Section 2D1.11(d)(14) (as so redesignated) is amended by striking "Level 14" and inserting "Level 12"; and by striking "At least 500 MG but less" each place such term appears and inserting "Less".

Section 2D1.11(e) is amended by striking paragraph (10); by redesignating paragraphs (1) through (9) as paragraphs (2) through (10), respectively; and by inserting before paragraph (2) (as so redesignated) the following new paragraph (1):

"(1)	List I Chemicals	**Level 30**
	2.7 KG or more of Benzaldehyde;	
	60 KG or more of Benzyl Cyanide;	
	600 G or more of Ergonovine;	
	1.2 KG or more of Ergotamine;	
	60 KG or more of Ethylamine;	
	6.6 KG or more of Hydriodic Acid;	
	3.9 KG or more of Iodine;	
	960 KG or more of Isosafrole;	
	600 G or more of Methylamine;	
	1500 KG or more of N-Methylephedrine;	
	1500 KG or more of N-Methylpseudoephedrine;	
	1.9 KG or more of Nitroethane;	
	30 KG or more of Norpseudoephedrine;	
	60 KG or more of Phenylacetic Acid;	
	30 KG or more of Piperidine;	
	960 KG or more of Piperonal;	
	4.8 KG or more of Propionic Anhydride;	
	960 KG or more of Safrole;	
	1200 KG or more of 3, 4-Methylenedioxyphenyl-2-propanone;	

3406.5 L or more of Gamma-butyrolactone;

2.1 KG or more of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid.".

Section 2D1.11(e)(2) (as so redesignated) is amended to read as follows:

"(2)	List I Chemicals	Level 28
	At least 890 G but less than 2.7 KG of Benzaldehyde;	
	At least 20 KG but less than 60 KG of Benzyl Cyanide;	
	At least 200 G but less than 600 G of Ergonovine;	
	At least 400 G but less than 1.2 KG of Ergotamine;	
	At least 20 KG but less than 60 KG of Ethylamine;	
	At least 2.2 KG but less than 6.6 KG of Hydriodic Acid;	
	At least 1.3 KG but less than 3.9 KG of Iodine;	
	At least 320 KG but less than 960 KG of Isosafrole;	
	At least 200 G but less than 600 G of Methylamine;	
	At least 500 KG but less than 1500 KG of N-Methylephedrine;	

At least 500 KG but less than 1500 KG of N-Methylpseudoephedrine;

At least 625 G but less than 1.9 KG of Nitroethane;

At least 10 KG but less than 30 KG of Norpseudoephedrine;

At least 20 KG but less than 60 KG of Phenylacetic Acid;

At least 10 KG but less than 30 KG of Piperidine;

At least 320 KG but less than 960 KG of Piperonal;

At least 1.6 KG but less than 4.8 KG of Propionic Anhydride;

At least 320 KG but less than 960 KG of Safrole;

At least 400 KG but less than 1200 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

At least 1135.5 L but less than 3406.5 L of Gamma-butyrolactone;

At least 714 G but less than 2.1 KG of Red Phosphorus, White Phosphorus, or

Hypophosphorous Acid.

List II Chemicals

33 KG or more of Acetic Anhydride;

3525 KG or more of Acetone;

60 KG or more of Benzyl Chloride;

3225 KG or more of Ethyl Ether;

3600 KG or more of Methyl Ethyl Ketone;

30 KG or more of Potassium Permanganate;

3900 KG or more of Toluene.".

Section 2D1.11(e)(3) (as so redesignated) is amended by striking "Level 28" and inserting "Level 26"; and, under the heading relating to List II Chemicals, by striking the line referenced to Acetic Anhydride and all that follows through the line referenced to Toluene and inserting the following:

" At least 11 KG but less than 33 KG of Acetic Anhydride;

At least 1175 KG but less than 3525 KG of Acetone;

At least 20 KG but less than 60 KG of Benzyl Chloride;

At least 1075 KG but less than 3225 KG of Ethyl Ether;

At least 1200 KG but less than 3600 KG of Methyl Ethyl Ketone;

At least 10 KG but less than 30 KG of Potassium Permanganate;

At least 1300 KG but less than 3900 KG of Toluene.".

Section 2D1.11(e)(4) (as so redesignated) is amended by striking "Level 26" and inserting "Level 24".

Section 2D1.11(e)(5) (as so redesignated) is amended by striking "Level 24" and inserting "Level 22".

Section 2D1.11(e)(6) (as so redesignated) is amended by striking "Level 22" and inserting "Level 20".

Section 2D1.11(e)(7) (as so redesignated) is amended by striking "Level 20" and inserting "Level 18".

Section 2D1.11(e)(8) (as so redesignated) is amended by striking "Level 18" and inserting "Level 16".

Section 2D1.11(e)(9) (as so redesignated) is amended by striking "Level 16" and inserting "Level 14".

Section 2D1.11(e)(10) (as so redesignated) is amended by striking "Level 14" and inserting "Level 12"; and in each line by striking "At least" and all that follows through "but less" and inserting "Less".

The Commentary to § 2D1.11 captioned "Application Notes" is amended in Note 1(A) by striking "38" both places such term appears and inserting "36", and by striking "26" and inserting "24"; and in Note 1(B) by striking "32" and inserting "30".

The Commentary to § 3B1.2 captioned "Application Notes" is amended in Note 3(B) by striking "14" and inserting "12".

The Commentary following § 3D1.5 captioned "Illustrations of the Operation of the Multiple-Count Rules" is amended in Example 2 by striking "26" and inserting "24"; and by striking "28" each place such term appears and inserting "26".

The Commentary to § 5G1.3 captioned "Application Notes" is amended in Note 2(D) by striking "40" and inserting "90"; by striking "15" and inserting "25"; and by striking "55" and inserting "115".

Reason for Amendment: This amendment revises the guidelines applicable to drug trafficking offenses by changing how the base offense levels in the Drug Quantity Table in § 2D1.1 (Unlawful Manufacturing, Importing, Exporting or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) incorporate the statutory mandatory minimum penalties for such offenses.

When Congress passed the Anti-Drug Abuse Act of 1986, Pub. L. 99-570, the Commission responded by generally incorporating the statutory mandatory minimum sentences into the guidelines and extrapolating upward and downward to set guideline sentencing ranges for all drug quantities. The quantity thresholds in the Drug Quantity Table were set so as to provide base offense levels corresponding to guideline ranges that were slightly above the statutory mandatory minimum penalties. Accordingly, offenses involving drug quantities that trigger a five-year statutory minimum were assigned a base offense level (level 26) corresponding to a sentencing guideline range of 63 to 78 months for a defendant in Criminal History Category I (a guideline range that exceeds the five-year statutory minimum for such offenses by at least three months). Similarly, offenses that trigger a ten-year statutory minimum were assigned a base offense level (level 32) corresponding to a sentencing guideline range of 121 to 151 months for a defendant in Criminal History Category I (a guideline range that exceeds the ten-year statutory minimum for such offenses by at least one month). The base offense levels for drug quantities above and below the mandatory minimum threshold quantities were extrapolated upward and downward to set guideline sentencing

ranges for all drug quantities, *see* § 2D1.1, comment. (backg'd.), with a minimum base offense level of 6 and a maximum base offense level of 38 for most drug types.

This amendment changes how the applicable statutory mandatory minimum penalties are incorporated into the Drug Quantity Table while maintaining consistency with such penalties. *See* 28 U.S.C. § 994(b)(1) (providing that each sentencing range must be "consistent with all pertinent provisions of title 18, United States Code"); *see also* 28 U.S.C. § 994(a) (providing that the Commission shall promulgate guidelines and policy statements "consistent with all pertinent provisions of any Federal statute").

Specifically, the amendment reduces by two levels the offense levels assigned to the quantities that trigger the statutory mandatory minimum penalties, resulting in corresponding guideline ranges that include the mandatory minimum penalties. Accordingly, offenses involving drug quantities that trigger a five-year statutory minimum are assigned a base offense level of 24 (51 to 63 months at Criminal History Category I, which includes the five-year (60 month) statutory minimum for such offenses), and offenses involving drug quantities that trigger a ten-year statutory minimum are assigned a base offense level of 30 (97 to 121 months at Criminal History Category I, which includes the ten-year (120 month) statutory minimum for such offenses). Offense levels for quantities above and below the mandatory minimum threshold quantities similarly are adjusted downward by two levels, except that the minimum base offense level of 6 and the maximum base offense

level of 38 for most drug types is retained, as are previously existing minimum and maximum base offense levels for particular drug types.

The amendment also makes parallel changes to the quantity tables in § 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), which apply to offenses involving chemical precursors of controlled substances. Section 2D1.11 is generally structured to provide offense levels that are tied to, but less severe than, the base offense levels in § 2D1.1 for offenses involving the final product.

In considering this amendment, the Commission held a hearing on March 13, 2014, and heard expert testimony from the Executive Branch, including the Attorney General and the Director of the Federal Bureau of Prisons, defense practitioners, state and local law enforcement, and interested community representatives. The Commission also received substantial written public comment, including from the Federal judiciary, members of Congress, academicians, community organizations, law enforcement groups, and individual members of the public.

The Commission determined that setting the base offense levels slightly above the mandatory minimum penalties is no longer necessary to achieve its stated purpose. Previously, the Commission has stated that "[t]he base offense levels are set at guideline ranges slightly higher than the mandatory minimum levels [levels 26 and 32] to permit some downward adjustment for defendants who plead guilty or otherwise cooperate with authorities." However,

changes in the law and recent experience with similar reductions in base offense levels for crack cocaine offenses indicate that setting the base offense levels above the mandatory minimum penalties is no longer necessary to provide adequate incentives to plead guilty or otherwise cooperate with authorities.

In 1994, after the initial selection of levels 26 and 32, Congress enacted the "safety valve" provision, which applies to certain non-violent drug defendants and allows the court, without a government motion, to impose a sentence below a statutory mandatory minimum penalty if the court finds, among other things, that the defendant "has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan." *See* 18 U.S.C. § 3553(f). The guidelines incorporate the "safety valve" at § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) and, furthermore, provide a 2-level reduction if the defendant meets the "safety valve" criteria. *See* § 2D1.1(b)(16).

These statutory and guideline provisions, which are unrelated to the guideline range's relationship to the mandatory minimum, provide adequate incentive to plead guilty. Commission data indicate that defendants charged with a mandatory minimum penalty in fact are more likely to plead guilty if they qualify for the "safety valve" than if they do not. In fiscal year 2012, drug trafficking defendants charged with a mandatory minimum penalty had a plea rate of 99.6 percent if they qualified for the "safety valve" and a plea rate of 93.9 percent if they did not.

Recent experience with similar reductions in the base offense levels for crack cocaine offenses indicates that the amendment should not negatively affect the rates at which offenders plead guilty or otherwise cooperate with authorities. Similar to this amendment, the Commission in 2007 amended the Drug Quantity Table for cocaine base ("crack" cocaine) so that the quantities that trigger mandatory minimum penalties were assigned base offense levels 24 and 30, rather than 26 and 32. *See* USSG App. C, Amendment 706 (effective November 1, 2007). In 2010, in implementing the emergency directive in section 8 of the Fair Sentencing Act of 2010, Pub. L. 111-220, the Commission moved crack cocaine offenses back to a guideline penalty structure based on levels 26 and 32.

During the period when crack cocaine offenses had a guideline penalty structure based on levels 24 and 30, the overall rates at which crack cocaine defendants pled guilty remained stable. Specifically, in the fiscal year before the 2007 amendment took effect, the plea rate for crack cocaine defendants was 93.1 percent. In the two fiscal years after the 2007 amendment took effect, the plea rates for such defendants were 95.2 percent and 94.0 percent, respectively. For those same fiscal years, the overall rates at which crack cocaine defendants received substantial assistance departures under § 5K1.1 (Substantial Assistance to Authorities) were 27.8 percent in the fiscal year before the 2007 amendment took effect and 25.3 percent and 25.6 percent in the two fiscal years after the 2007 amendment took effect. This recent experience indicates that this amendment, which is similar in nature to the 2007 crack cocaine amendment, should not negatively affect the willingness of defendants to

plead guilty or otherwise cooperate with authorities. *See* 28 U.S.C. § 991(b) (specifying that sentencing policies are to "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process").

The amendment also reflects the fact that the guidelines now more adequately differentiate among drug trafficking offenders than when the Drug Quantity Table was initially established. Since the initial selection of offense levels 26 and 32, the guidelines have been amended many times—often in response to congressional directives—to provide a greater emphasis on the defendant's conduct and role in the offense rather than on drug quantity. The version of § 2D1.1 in the original 1987 Guidelines Manual contained a single specific offense characteristic: a 2-level enhancement if a firearm or other dangerous weapon was possessed. Section 2D1.1 in effect at the time of this amendment contains fourteen enhancements and three downward adjustments (including the "mitigating role cap" provided in subsection (a)(5)). These numerous adjustments, both increasing and decreasing offense levels based on specific conduct, reduce the need to rely on drug quantity in setting the guideline penalties for drug trafficking offenders as a proxy for culpability, and the amendment permits these adjustments to differentiate among offenders more effectively.

The amendment was also motived by the significant overcapacity and costs of the Federal Bureau of Prisons. The Sentencing Reform Act directs the Commission to ensure that the sentencing guidelines are "formulated to minimize the likelihood that the

Federal prison population will exceed the capacity of the Federal prisons." *See* 28 U.S.C. § 994(g). Reducing the federal prison population and the costs of incarceration has become an urgent consideration. The Commission observed that the federal prisons are now 32 percent overcapacity, and drug trafficking offenders account for approximately 50 percent of the federal prison population (100,114 of 199,810 inmates as of October 26, 2013, for whom the Commission could determine the offense of conviction). Spending on federal prisons exceeds $6 billion a year, or more than 25 percent of the entire budget for the Department of Justice. The Commission received testimony from the Department of Justice and others that spending on federal prisons is now crowding out resources available for federal prosecutors and law enforcement, aid to state and local law enforcement, crime victim services, and crime prevention programs, all of which promote public safety.

In response to these concerns, the Commission considered the amendment an appropriate step toward alleviating the overcapacity of the federal prisons. Based on an analysis of the 24,968 offenders sentenced under § 2D1.1 in fiscal year 2012, the Commission estimates the amendment will affect the sentences of 17,457—or 69.9 percent—of drug trafficking offenders sentenced under § 2D1.1, and their average sentence will be reduced by 11 months—or 17.7 percent—from 62 months to 51 months. The Commission estimates these sentence reductions will correspond to a reduction in the federal prison population of approximately 6,500 inmates within five years after its effective date.

The Commission carefully weighed public safety concerns and, based on past experience, existing statutory and guideline enhancements, and expert testimony, concluded that the amendment should not jeopardize public safety. In particular, the Commission was informed by its studies that compared the recidivism rates for offenders who were released early as a result of retroactive application of the Commission's 2007 crack cocaine amendment with a control group of offenders who served their full terms of imprisonment. *See* USSG App. C, Amendment 713 (effective March 3, 2008). The Commission detected no statistically significant difference in the rates of recidivism for the two groups of offenders after two years, and again after five years. This study suggests that modest reductions in drug penalties such as those provided by the amendment will not increase the risk of recidivism.

Furthermore, existing statutory enhancements, such as those available under 18 U.S.C. § 924(c), and guideline enhancements for offenders who possess firearms, use violence, have an aggravating role in the offense, or are repeat or career offenders, ensure that the most dangerous or serious offenders will continue to receive appropriately severe sentences. In addition, the Drug Quantity Table as amended still provides a base offense level of 38 for offenders who traffic the greatest quantities of most drug types and, therefore, sentences for these offenders will not be reduced. Similarly, the Drug Quantity Table as amended maintains minimum base offense levels that preclude sentences of straight probation for drug trafficking offenders with small quantities of most drug types.

Finally, the Commission relied on testimony from the Department of Justice that the amendment would not undermine public safety or law enforcement initiatives. To the contrary, the Commission received testimony from several stakeholders that the amendment would permit resources otherwise dedicated to housing prisoners to be used to reduce overcrowding, enhance programming designed to reduce the risk of recidivism, and to increase law enforcement and crime prevention efforts, thereby enhancing public safety.

Effective Date: The effective date of this amendment is November 1, 2014.

United States Sentencing Commission
Guidelines Manual
Supplement to Appendix C

Amendments to the Guidelines Manual

788. Amendment

Section 1B1.10, as amended by Amendment 780, is further amended in subsection (d) by striking "and" and by inserting ", and 782 (subject to subsection (e)(1))" before the period at the end;

and by adding at the end the following new subsection (e):

"(e) Special Instruction.—

(1) The court shall not order a reduced term of imprisonment based on Amendment 782 unless the effective date of the court's order is November 1, 2015, or later.".

The Commentary to 1B1.10 captioned "Application Notes", as amended by Amendment 780, is further amended by redesignating Notes 6 and 7 as Notes 7 and 8, respectively;

and by inserting after Note 5 the following new Note 6:

"6. Application to Amendment 782.—As specified in subsection (d) and (e)(1), Amendment 782 (generally revising the Drug Quantity Table and chemical quantity tables across drug and chemical types) is covered by this policy statement only in cases in which the order reducing the defendant's term of imprisonment

has an effective date of November 1, 2015, or later.

A reduction based on retroactive application of Amendment 782 that does not comply with the requirement that the order take effect on November 1, 2015, or later is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2).

Subsection (e)(1) does not preclude the court from conducting sentence reduction proceedings and entering orders under 18 U.S.C. § 3582(c)(2) and this policy statement before November 1, 2015, provided that any order reducing the defendant's term of imprisonment has an effective date of November 1, 2015, or later.".

Reason for Amendment: This amendment expands the listing in § 1B1.10(d) to implement the directive in 28 U.S.C. § 994(u) with respect to guideline amendments that may be considered for retroactive application. The Commission has determined that Amendment 782, subject to the limitation in new § 1B1.10(e) delaying the effective date of sentence reduction orders until November 1, 2015, should be applied retroactively.

Amendment 782 reduced by two levels the offense levels assigned to the quantities that trigger the statutory mandatory minimum penalties in § 2D1.1, and made parallel changes to § 2D1.11. Under the applicable standards set forth in the background commentary to § 1B1.10, the Commission considers the following factors, among others: (1) the purpose of the amendment, (2) the magnitude of the change in the

guideline range made by the amendment, and (3) the difficulty of applying the amendment retroactively. *See* § 1B1.10, comment. (backg'd.). Applying those standards to Amendment 782, the Commission determined that, among other factors:

> (1) The purposes of the amendment are to reflect the Commission's determination that setting the base offense levels above mandatory minimum penalties is no longer necessary and that a reduction would be an appropriate step toward alleviating the overcapacity of the federal prisons. *See* 28 U.S.C. § 994(g) (requiring the Commission to formulate guidelines to "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons").
>
> (2) The number of cases potentially involved is large, and the magnitude of the change in the guideline range is significant. The Commission determined that an estimated 46,000 offenders may benefit from retroactive application of Amendment 782 subject to the limitation in § 1B1.10(e), and the average sentence reduction would be approximately 18 percent.
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> (3) The administrative burdens of applying Amendment 782 retroactively are significant but manageable given the one-year delay in the effective date, which allows courts and agencies more time to prepare. This determination was informed by testimony at the Commission's June 10, 2014 public hearing on retroactivity and by other public comment received by the Commission.

The Commission determined that public safety, among other factors, requires a limitation on retroactive application of Amendment 782. In light of the large number of cases potentially involved, the Commission determined that the agencies of the federal criminal justice system responsible for the offenders' reentry into society need time to prepare, and to help the offenders prepare, for that reentry. For example, the Bureau of Prisons has the responsibility under 18 U.S.C. § 3624(c) to ensure, to the extent practicable, that the defendant will spend a portion of his or her term of imprisonment under conditions that will afford the defendant a reasonable opportunity to adjust to and prepare for his or her reentry into the community. The Commission received testimony indicating that some offenders released pursuant to earlier retroactive guideline amendments had been released without having had this opportunity. In addition, for many of the defendants potentially involved, their sentence includes a term of supervised release after imprisonment. The judiciary and its probation officers will have the responsibility under 18 U.S.C. § 3624(e) to supervise those defendants when they are released by the Bureau of Prisons. The Commission received testimony from the Criminal Law Committee of the Judicial Conference of the United States that a delay would permit courts and probation offices to prepare to effectively supervise this increased number of defendants.

The Commission concluded that a one-year delay in the effective date of any orders granting sentence reductions under Amendment 782 is needed (1) to give courts adequate time to obtain and review the information necessary to make an individualized

determination in each case of whether a sentence reduction is appropriate, (2) to ensure that, to the extent practicable, all offenders who are to be released have the opportunity to participate in reentry programs and transitional services, such as placement in halfway houses, while still in the custody of the Bureau of Prisons, which increases their likelihood of successful reentry to society and thereby promotes public safety, and (3) to permit those agencies that will be responsible for offenders after their release to prepare for the increased responsibility. Therefore, the Commission added a Special Instruction at subsection (e) providing that a reduced term of imprisonment based on retroactive application of Amendment 782 shall not be ordered unless the effective date of the court's order is November 1, 2015, or later. An application note clarifies that this special instruction does not preclude the court from conducting sentence reduction proceedings before November 1, 2015, as long as any order reducing the defendant's term of imprisonment has an effective date of November 1, 2015, or later. As a result, offenders cannot be released from custody pursuant to retroactive application of Amendment 782 before November 1, 2015.

In addition, public safety will be considered in every case because § 1B1.10 requires the court, in determining whether and to what extent a reduction in the defendant's term of imprisonment is warranted, to consider the nature and seriousness of the danger to any person or the community that may be posed by such a reduction. *See* § 1B1.10, comment. (n.1(B)(ii)).

Effective Date: The effective date of this amendment is November 1, 2014.